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**Private and Public
Antitrust Enforcement
Live Together in Perfect
Harmony?**

Antitrust Enforcement after the
Harmonisation of Private Damages
Actions

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Summary

Private actions for damages for competition law infringements has been a fiercely discussed topic in the European Union for more than a decade now. It was the famous *Courage v. Crehan* judgment from 2001, where the Court of Justice for the first time expressly stated that ‘any individual’ has the right to claim damages for a breach of EU competition law. Following the Green Paper in 2005, in 2008 the Commission issued the White Paper, which entailed a number of measures to be taken in order to overcome the current ineffectiveness of antitrust damages actions and to ensure that all victims of infringements of EU competition law can fully be compensated for their harm.

In addition to addressing the procedural obstacles faced by litigants, the White Paper also included measures, which would form private enforcement’s relationship with public enforcement and indicate the former’s position in the overall enforcement system. It is this controversial role of private enforcement, which provided the inspiration for this thesis.

The main function of private damages actions is to compensate the victims. For the Commission, however, the main function of competition enforcement is deterrence, where private damages actions contribute only little. This perception of the Commission greatly influenced the content of the proposals made in the White Paper, especially when it had to weigh the two enforcement methods against each other.

There are four main areas dealt with in the White Paper, where in addition to facilitating damages claims, the Commission has also influenced the relationship between private and public enforcement. These are: the binding effect of NCA decisions, leniency, access to evidence and finally fines and damages.

After having analysed these four areas, the conclusion is that the Commission’s proposals improve the potential claimants’ conditions for claiming damages, but at the same time, they also aim to ensure the dominance of public enforcement. This is especially clear in relation to leniency, where the Commission’s proposal to limit civil liability of successful leniency applicants goes directly against the principle of full compensation for all victims. Therefore, it seems that the Commission considers private damages actions mostly as adding to the deterrent effect, thus not prioritising their compensatory nature. Thus, even if the damages actions are facilitated by the measure, private enforcement still only has a secondary role next to public enforcement in the EU.

Abbreviations

CMLRev.	Common Market Law Review
CompLRev.	Competition Law Review
DG	Directorate General
EC (Treaty)	Treaty establishing the European Community
ECLR	European Competition Law Review
ECN	European Competition Network
ELRev.	European Law Review
ERPL	European Review of Private Law
GWB	Gesetz gegen Wettbewerbsbeschränkungen
NCA	National Competition Authority
OJ	Official Journal
TFEU	Treaty on the functioning of the European Union

1 Introduction

1.1 Background

To begin with, it is important to stress that the pairing of public and private enforcement of legal rules is not unique to the antitrust laws. This notion certainly predates those laws and expresses more fundamental ideas about the relationship between the state and private individuals and their respective roles in the implementation of the law.¹

It is generally accepted now that undertakings can be held liable for infringements of EU Competition law provisions, i.e. Articles 101 and 102 TFEU², both in public and private enforcement procedures. The case law and legislation on public enforcement on national (except for the ‘new’ Member States) and EU level has developed over several decades and therefore has reached a point of stability and maturity. The current system of public enforcement can be ascribed primarily to the EU legislator, laying down the procedural rules for the application of Articles 101 and 102 TFEU in individual cases in Council Regulation 1/2003³ (hereinafter ‘Regulation 1/2003’) and the European Commission (hereinafter ‘the Commission’), with its wealthy decision-making practice.⁴ However, the world of antitrust enforcement in the EU is far from perfect. Although the EU commits comparatively generous resources to combat antitrust violations and additionally, it cooperates with the competition authorities of Member States, comprehensive control of anti-competitive or abusive practices through administrative action alone remains illusory.⁵

Under the national laws of several Member States the possibility and availability of actions for damages⁶ has existed for a long time.⁷ Therefore, it should not be surprising that the Commission declared almost 30 years ago that it considers damages litigation desirable.⁸ However, regardless of

¹ A.P. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ 3(1) *CompLRev.* (2006), p. 10.

² Treaty on the functioning of the European Union, OJ C 115/49, 09.05.2008.

³ Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1-25, 04.01.2003.

⁴ M.J. Frese, ‘Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability’, 34(3) *World Competition* (2011), p. 398.

⁵ T. Eilmansberger, ‘The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action’, 44(2) *CMLRev.* (2007), p. 432.

⁶ Private enforcement, action for damages, private damages claims are used interchangeably throughout this thesis.

⁷ See, for example, in the UK: *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; in Germany: since 1955, special provisions in the Act against Restraints of Competition have enabled damages to be sought for harm resulting from anti-competitive conduct. Available at

http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/germany_en.pdf

⁸ XIIIth Report on Competition Policy 1983 (1984), pp. 135-136. Available at

this statement, private enforcement came into the centre of attention of the European Commission a mere ten years ago and hence is not yet fully functional, to say the least. The so-called Ashurst Study famously referred to a state of ‘astonishing diversity and total underdevelopment’.⁹ By comparison, there is no doubt that private enforcement in Europe is certainly far less well developed than in the US. This is because the whole institutional system of antitrust enforcement in Europe has been fundamentally different, owing to the overwhelmingly central role of public enforcement.¹⁰ It was clear that this situation was not going to change on its own and that something needed to be done to advance private enforcement.

The judgment of the Court of Justice of the European Union (hereinafter ‘the Court’) in *Courage v. Crehan*¹¹ was the first time at Union level, in which the Court explicitly confirmed that the right to damages for breach of competition law derives directly from Union law. Therefore, it can be said that credit for the system of private enforcement may be claimed by the Court, who was the one giving the Commission the necessary impulse to start working on strengthening private enforcement. So, apart from Regulation 1/2003, which made Articles 101 and 102 TFEU directly applicable in full and thereby facilitated the prohibition worded in those provisions, most developments in the field of private enforcement materialized progressively in the course of over fifty years of case law.¹²

Although the statement made by the Court was straightforward and the message clear, some authors were still not convinced in the beginning of the last decade. They were questioning the importance of developing a stronger private enforcement system or even the necessity of having such a system at all, by stating that public enforcement fulfils the need of enforcement and deterrence.¹³ However, this view was struck down harshly and quickly by other authors arguing in favour of private enforcement of competition law.¹⁴

The need to strengthen private enforcement has been a highly discussed topic for at least ten years now. The stronger the voices became supporting a model of competition law enforcement, which would also include a functioning private enforcement system, the more discussions were started

http://ec.europa.eu/competition/publications/annual_report/index.html

⁹ Study on the conditions of claims for damages in case of infringement of EC competition rules, produced by Ashurst for DG Competition, 31 August 2004. Executive Summary, p. 1.

¹⁰ A.P. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ 3(1) *CompLRev.* (2006), p. 6.

¹¹ Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, in particular paras. 26-28, 32-33.

¹² M.J. Frese, ‘Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability’, 34(3) *World Competition* (2011), p. 398.

¹³ Most notably, W.P.J. Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ 26(3) *World Competition* (2003).

¹⁴ See, for example, C.A. Jones, ‘Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check’, 27(1) *World Competition* (2004), p. 13: ‘(t)his view is demonstrably in error from conceptual and practical standpoints and relies on purely non-legal theoretical grounds and authorities which have no substantial application in the European Union’.

on how this should be done. So the Commission set out on the mission to identify the existing obstacles hindering private enforcement actions and as a result issued the '*Green Paper on Damage Actions for Breach of EC Antitrust Rules*' (hereinafter 'Green Paper').¹⁵

After the Green Paper, the discussions became even more heated and it was clear that the Commission did not have an easy task in getting all the stakeholders and more importantly all the Member States to agree on how exactly private enforcement should be strengthened on Union level. Some questioned whether action at Union level was even necessary in the first place. After all, the harmonisation measures would have struck very deep into an area, where the Member States so far have enjoyed sole competence.

However, even before a measure can take form, the Commission needs to understand what it tries to achieve with the strengthening of private enforcement and what the latter's aim is in the overall enforcement system. Since in this system, private enforcement needs to interact with public enforcement, which already has an established position. The question of interplay between private and public enforcement has raised into the focus of attention only in the last years, as the likelihood of a positive harmonisation of private enforcement is growing. To see where these discussions in the doctrine have led and where the development in the Union legislation has come to during this time justifies a closer look into this matter and hence the writing of this thesis.

1.2 Purpose

The aim of this thesis, more specifically, is to find out what position private enforcement will have in relation to public enforcement and in the overall enforcement system after the harmonisation of private damages actions. At the moment, the general perception is that the Commission is striving for a dual enforcement system, including both public and private enforcement. To understand what role private damages actions have to play in this system, first, their function needs to be determined. After that it becomes possible to see how the relationship between the two 'limbs' of enforcement looks like.

This allows to identify the areas in which the two parts of the enforcement system are working in a complementary manner and areas where they work in a counter-active manner. These must then be assessed in the light of the proposals made by the Commission in the '*White Paper on damages actions for breach of EC antitrust rules*'¹⁶ (hereinafter 'White Paper'). The outcome of this assessment should demonstrate how the Commission has handled the extremely difficult task of finding the delicate balance between the two enforcement methods in a situation where it strives for a stronger private

¹⁵ COM(2005) 672, 19.12.2005.

¹⁶ COM(2008) 165, 02.04.2008.

enforcement, while trying to maintain the current dominance of the public enforcer.

1.3 Delimitation

Damages actions are not the only possibility for private parties to enforce their rights under competition law. Private parties harmed or likely to be harmed by antitrust infringements can also bring actions for injunctive relief in national courts, and the antitrust prohibitions can also be invoked defensively in private contractual or intellectual property litigation.¹⁷ In practice, it appears that Article 101(2) TFEU¹⁸ is regularly invoked in contractual disputes as a defence against actions for breach of contract.¹⁹ However, this latter form of private enforcement is not dealt with by this thesis, as the White Paper concentrates on facilitating damages actions.²⁰ Furthermore, injunctive relief is not a problematic matter either when it comes to the interplay between public and private enforcement.

An additional delimitation comes from the fact that this thesis focuses only on the overall impact of harmonisation of private damages actions on the enforcement system. Therefore, the procedural issues (like passing-on defence, collective redress, limitation periods, etc.) addressed in the White Paper will not be touched upon, as they do not have such a significant influence the interaction between the two enforcement methods.

1.4 Method and Material

This thesis uses the traditional (dogmatic) method to interpret the existing law and to systematize the relevant case law and doctrine, in order to then see how the Commission's harmonisation plans fit into the existing (mainly administrative) enforcement system.

At the moment there is no hard-law existing on the Union level regarding private enforcement, therefore this thesis will analyse the White Paper issued by the Commission in 2008, as the unofficial '*Draft Proposal for a Directive on Rules Governing Damages Actions for Infringements of Articles 81 and 82 of the Treaty*' is not publicly available. Case law of the Court is not in a better state, as to present date, there have only been a few cases involving the private enforcement questions.

¹⁷ W.P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 32(1) World Competition (2009), p. 4.

¹⁸ Art 101(2) TFEU: 'Any agreements or decisions prohibited pursuant to this article shall be automatically void.'

¹⁹ W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' 26(3) World Competition (2003), p. 475.

²⁰ See, White Paper, s. 1.2.

The doctrine regarding the matter of private enforcement in Europe has been led by two distinct authors – A.P. Komninos and W.P.J. Wils. Therefore, in this thesis, their articles, books and opinions will be covered extensively. Nevertheless, other authors' works participating in the discussion will also be presented, as well as some of the speeches of the former Competition Commissioner Neelie Kroes and the current Commissioner Joaquín Almunia.

1.5 Outline

The thesis will be structured in the following way. At the outset, the system of private enforcement of antitrust law will be examined. This includes a thorough description of private enforcement, including its historic development through case law and the measures taken by the Commission. In addition, the arguments of those questioning the necessity of private enforcement will be presented.

The next chapter turns to the matter of functions of private enforcement in the overall antitrust enforcement system. The aim of this is to understand, what role has been envisaged for the private damages claims. Also, the question is whether it is clear what kind of a relationship the two 'limbs' of enforcement have with each other and whether the Commission itself has figured out what purpose each of this method fulfils in the overall enforcement system. This analysis is indispensable for the outcome of the thesis, as after this has been carried out, it can then be determined, what areas need the most attention in the harmonisation process.

In the subsequent chapter, the most important issue will be discussed – namely the effects of harmonisation of private enforcement on public enforcement. This chapter is divided into four subchapters covering the matters of binding effect on national competition authorities (hereinafter 'NCA') decisions, leniency, access to evidence and finally fines and damages.

The final chapter includes the concluding analysis of this topic and discusses how the proposals made in the White Paper influence the position of private enforcement in the overall antitrust enforcement system, including its interaction with public enforcement after the harmonisation.

2 Private Enforcement of Competition Law

As explained above, the enforcement model the Commission is striving for combines both public and private enforcement efforts to guarantee the best possible functioning of EU competition rules. As the problematic part of this equation is private enforcement, the latter must be analysed thoroughly. Public enforcement is already a well-developed functioning system and does not need special attention in this section.

2.1 Definition

In private enforcement the individual controls the proceedings and he may either appear as a plaintiff or as a defendant in a civil claim, while the competition rules may be both used as a ‘sword’ and as a ‘shield’.²¹

The most obvious example of the use of competition law as a ‘sword’ is when a party claims damages suffered as a result of an infringement of competition law.²² However, as to the use of Articles 101 or 102 TFEU as a ‘sword’, the Treaty is silent.²³ This silence is the cause of the controversy surrounding the topic of private damages claims, leaving some commentators questioning whether this possibility should exist at all. These arguments will be presented in chapter 2.4.

The antitrust prohibitions are used as a ‘shield’ when they are invoked in defence against a contractual claim for performance or for damages because of non-performance or against some other claim, for instance in an intellectual property infringement action.²⁴ The use of Article 101 TFEU as a ‘shield’ in contractual disputes has its basis directly in the Treaty, more precisely in Article 101(2) TFEU, which provides for a voidness sanction. It is undoubtedly a useful and effective instrument to enforce the prohibition of restrictive agreements contained in Article 101 TFEU.²⁵

There is another way of dividing private actions into two distinct groups, namely stand-alone and follow-on actions. Follow-on actions are defined as cases in which the civil action is brought after a competition authority has found an infringement, meaning that they follow public enforcement

²¹ V. Milutinović, *The ‘right to damages’ under EU competition law: from Courage v. Crehan to the White Paper and beyond* (Kluwer Law International, 2010), p. 13.

²² M. Hazelhorst, ‘Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far’, 19(4) ERPL (2010), p. 762.

²³ W.P.J. Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ 26(3) World Competition (2003), p. 475.

²⁴ Ibid, p. 475.

²⁵ Ibid, pp. 474-475.

proceedings. Although the plaintiff in these cases can rely on the preceding investigation, he still has to show that he suffered a loss and that this loss was caused by the violation of a competition law provision. For stand-alone actions the definition is the following – actions, which do not necessitate a prior finding by a competition authority, but which are brought independently from public enforcement. In these cases, the plaintiff carries the additional burden of proving that there actually was a breach of competition law provisions.

It has been argued that the only types of damages actions, which can be encouraged by legislative measures with realistic chances of success, are follow-on actions. These, however, have a limited enforcement value only, because from an enforcement perspective, there is no added value, as by definition, these damages relate to conduct which has already been terminated by administrative decisions.²⁶ The Commission on the other hand finds the stand-alone and follow-on actions equally necessary from the perspective of enforcement and has issued the White Paper in regard to both of these.²⁷

The former EU Competition Commissioner Neelie Kroes had strong belief in private enforcement and saw the benefits of it to EU competition. To put it in her own words:

‘I am personally convinced that there is a lot of potential in advancing private enforcement of the European competition rules. ... it could really contribute to our number one priority in Europe: creating a more competitive environment for business and industry, and thus growth and economic and social welfare for our citizens. ...the threat of having to pay damages for the harm caused by an infringement of the competition rules has a strong additional deterrent effect.’²⁸

2.2 Development through Case Law

As early as 1993, Advocate-General Van Gerven devoted most of his opinion in the *Banks* case to pleading for the necessity of the existence of a Community (now Union) right in damages for breaches of competition law, and to a detailed description of its legal regime.²⁹

He pointed out two very convincing arguments as to why private actions for damages should be made available under Community law. First, he claimed that awarding damages to the injured party is the only effective method

²⁶ T. Eilmansberger, ‘The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action’, 44(2) CMLRev. (2007), pp. 477-478.

²⁷ White Paper, s. 1.2.

²⁸ N. Kroes, ‘Enhancing Actions for Damages for Breach of Competition Rules in Europe’, 22 September 2005, SPEECH/05/533. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/533>

²⁹ Opinion of Advocate General Van Gerven on 27 October 1993 in Case C-128/92 *Banks* [1994] ECR I-1209, paras. 36-54.

whereby the national court can fully safeguard the directly effective provisions of Community law, which have been infringed upon. In addition, he found that such a rule on reparation plays a significant role in making the Community rules of competition more operational. He finished by stating:

‘I conclude from the foregoing that the right to obtain reparation in respect of loss and damage sustained as a result of an undertaking’s infringement of Community competition rules which have direct effect is based on the Community legal order itself. Consequently, as a result of its obligation to ensure that Community law is fully effective and to protect the rights thereby conferred on individuals, the national court is under an obligation to award damages for loss sustained by an undertaking as a result of the breach by another undertaking of a directly effective provision of Community competition law.’³⁰

The Court did not discuss this matter in its judgment in *Banks* and it took the Court another eight years before they took a standpoint on the matter of private damages actions in Union law.

The *Courage v. Crehan*³¹ judgment builds on earlier case law, most notably the *Francovich*³² and *Brasserie du Pêcheur*³³ cases, in which the Court expressed the principle of State liability for breaches of Community (now Union) law.³⁴ In *Courage v. Crehan*, this line of reasoning is extended to private parties, and it is expressed as a matter of principle, which eliminated uncertainty and gave an important signal to national courts.³⁵

The most important statement made by the Court in this case is that:

‘The full effectiveness of Article 85 [now Art 101 TFEU] ... would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.’³⁶

Since the Court’s clarification in *Courage v. Crehan* damages claims have a solid foundation in Union law, notwithstanding the silence of the TFEU. However, even if many were hoping for it, it did not turn out to be the case, which ‘banged the bell’, triggering a wave of antitrust damages litigation in Europe.³⁷ Such an expectation was unrealistic from the outset. On the contrary, it would have been quite surprising if this case alone had managed to bring about a significant increase in such actions.³⁸

³⁰ Ibid, para. 45.

³¹ Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297.

³² Joined cases C-6/90 and 9-/90 *Francovich* [1991] ECR I-5357.

³³ Joined cases C-46/93 and 48/93 *Brasserie du Pêcheur* [1996] ECR I-1029.

³⁴ M. Hazelhorst, ‘Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far’, 19(4) ERPL (2010), p. 762.

³⁵ A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart, 2008), p. 171.

³⁶ Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, para. 26.

³⁷ T. Eilmansberger, ‘The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action’, 44(2) CMLRev. (2007), p. 433.

³⁸ Ibid, p. 433.

The impact of the clarification that such claims arise as a matter of Union law was bound to be limited, since the principle that a violation of Article 101 and 102 TFEU could give rise to damages claims never truly seemed to be in dispute. Jones, for example, found already before the *Courage v. Crehan* case that the right to private enforcement actions comes from the guiding principles of Union law.³⁹ Reich found that whether such a right exists is a question of effective legal protection.⁴⁰ Eilmansberger concluded that it was not the uncertainty regarding the existence of these claims, but unfavourable or restrictive elements of this remedy, a lack of clarity as to its application, and a general reluctance to use that weapon that were restraining potential plaintiffs.⁴¹ The Court in *Courage v. Crehan*, however, did not address any of these restraints or concerns. Therefore, it should not have been unexpected that there was not a big change in the number of private actions for damages.

The next judgment from the Court regarding the matter of damages actions was *Manfredi*.⁴² There the Court, in addition to emphasising the importance of existence of damages claims went further by clarifying also what kind of damages must be compensated. The Court stated that that injured persons must be able to seek compensation not only for actual loss but also for loss of profit plus interest.⁴³ As regards to exemplary or punitive damages, the Court found that if these damages are available in domestic actions similar to actions founded on the Union competition rules, it must also be possible to award such damages in actions founded on Union rules.⁴⁴ Those expecting something revolutionary regarding private damages claims to come from this case were disappointed, but then again, it is not up to the Court to create new law, but to interpret the existing rules.

2.3 White Paper and its Aftermath

In 2008, the Commission finally issued the White Paper, which entailed a number of measures to be taken in order to ‘overcome the current ineffectiveness of antitrust damages actions’⁴⁵ and to ensure that all victims of infringements of EC (now EU) competition law can fully be compensated for their harm.⁴⁶ This means that full compensation is, the first and foremost guiding principle.⁴⁷ Nevertheless, the enforcement idea, put forward in the

³⁹ C.A. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford, 1999), p. 46.

⁴⁰ N. Reich, ‘The ‘Courage’ Doctrine: Encouraging or Discouraging Compensation for Antitrust Injuries?’ 42(1) CMLRev. (2005), p. 39.

⁴¹ T. Eilmansberger, ‘The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action’, 44(2) CMLRev. (2007), p. 433.

⁴² Joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619.

⁴³ *Ibid*, para. 100.

⁴⁴ *Ibid*, para. 99.

⁴⁵ White Paper, s. 1.1.

⁴⁶ *Ibid*, s. 1.2.

⁴⁷ See, *ibid*, s. 1.2.

Commission's previous Green Paper,⁴⁸ had not completely disappeared in the White Paper. The Commission indeed pointed out that more effective compensatory mechanisms will increase detection of competition law infringements as well as the likeliness that infringers will be held liable. Better compensatory mechanisms will therefore have an inherently beneficial effect in terms of compliance with the competition rules and deterrence of future infringements.⁴⁹ This tension between the two functions (compensation and deterrence) will be further discussed in chapters 3 and 4 of this thesis.

As soon as the White Paper was issued, commentators started to point out the mistakes the Commission had done in drafting it. One of the misses pointed out was that the White Paper appeared to underestimate the possible consequences arising from the concurrent existence of public and private enforcement, such as the need for a mechanism that would prevent over-enforcement and rules that would regulate all the aspects arising out of the interaction among the various enforcement means.⁵⁰ Surely, one can see that coordination is needed for example between fines and damages, which will be discussed in chapter 4.4.3.

Another mistake the Commission made already in the Green Paper and repeated when issuing the White Paper was the failure to provide a reason for needing legislative action in this area on Union level. Therefore, by not indicating a clear need for legislative intervention, the Commission may have done itself a considerable disservice. For the credibility of a project as significant as the White Paper, it is imperative that the Commission proves a sound basis.⁵¹

There is a further reason for the growing resistance against the Commission's initiative. Namely, almost all Member States have raised questions as to the Commission's authority to introduce legislation to facilitate antitrust damage claims. Some Member States have expressly rejected the necessity of European legislative measures.⁵² The opposition of Member States to legislative action on Union level is understandable, when looking at the effects the harmonisation process would have on their tort law systems. At the moment, most of the Member States do not have a self-standing competition law regulation for private actions for damages coming

⁴⁸ Green Paper, s. 1.1.

⁴⁹ White Paper, s. 1.2.

⁵⁰ J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) European Competition Journal (2009), p. 543.

⁵¹ J.S. Kortmann and Ch.R.A. Swaak, 'The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic', 30(7) ECLR (2009), p. 350.

⁵² See for example, Comments of the Federal Ministry of Economics and Technology, the Federal Ministry of Justice, the Federal Ministry of Food, Agriculture and Consumer Protection and the Bundeskartellamt on the EU Commission's White Paper on 'Damages actions for breach of the EC antitrust rules'. Available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/bund_en.pdf.

from competition law breaches. Instead, they are dealt with under the existing tort law regulation.

Therefore, the proposed measures in the White Paper cut across some substantial differences between the tort law systems of the various Member States. It should not be too difficult to comprehend that by introducing a separate, supranational set of rules for antitrust damages – even if they are just ‘minimum rules’ – the Commission is bound to create an imbalance on the national level.⁵³ Inevitably these changes will not be warmly welcomed by the Member States. To conclude this discussion one could find that so far the Commission has not demonstrated that the reforms it is advocating are necessary or even desirable.⁵⁴

Eilmansberger commented already after the issuing of the Green Paper that the creation of a special regime for antitrust torts is not necessary.⁵⁵ He criticized the Commission’s proposal on the grounds that the rules governing torts in general are perfectly suitable for cartel damages claims as well and that there is no reason why the principles governing the development of regular torts should not be applicable in antitrust context. He explained that these rules and principles are the result of a long and on-going jurisdictional development, which seeks to balance the interests of the plaintiff and the defendant on the one hand, and the public interest in encouraging or restricting such claims on the other.⁵⁶

The Commission did not let this opposition by the Member States and scholars stop it from its mission and soon after publishing the White Paper what appears to be a draft ‘Proposal for a Directive on Rules Governing Damages Actions for Infringements of Articles 81 and 82 of the Treaty’ was leaked.⁵⁷ While currently its status is unclear, the contents of this document suggest that the Commission intends to press ahead and introduce far-reaching legislative measures to facilitate antitrust damage claims, as contemplated in the White Paper.⁵⁸

2.4 No Need for Private Enforcement?

For the sake of explaining the whole spectrum of arguments in relation to private enforcement, it is necessary to present the points made by those,

⁵³ J.S. Kortmann and Ch.R.A. Swaak, ‘The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic’, 30(7) ECLR (2009), p. 341.

⁵⁴ *Ibid*, p. 341.

⁵⁵ T. Eilmansberger, ‘The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action’, 44(2) CMLRev. (2007), p. 442.

⁵⁶ *Ibid*, p. 442.

⁵⁷ The Draft is not publicly available.

⁵⁸ J.S. Kortmann and Ch.R.A. Swaak, ‘The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic’, 30(7) ECLR (2009), p. 341.

who do not see any use for private actions in the overall enforcement system.

Most prominent representative of the anti-private enforcement authors is Wils. He argued that in order to ensure that the antitrust prohibitions are not violated, public antitrust enforcement is inherently superior to private enforcement. The explanation for such a standpoint was that public enforcement has more effective investigative and sanctioning powers than private and also because private actions are driven by profit motives, which fundamentally diverge from the general interest in this area. He did not even see private enforcement having a supplementary role, as according to him the adequate level of sanctions and the adequate number and variety of prosecutions could be ensured more effectively and at a lower cost through public enforcement.⁵⁹

This total negation of the necessity of private enforcement received backing up from German scholars. Böge and Ost argued that punishing competition law infringements is not a task of 'private attorneys-general' but needs to remain under the sole control of competition authorities. Their reasoning was that these authorities have better facilities for investigations and establishing proof, which are not available to private parties. In addition, they contended that competition authorities are better suited for safeguarding the public interest, as they saw public and private interests to be conflicting,⁶⁰ hence not pursuing the same ultimate goal of effective competition. The issue of clashes between public and private enforcement will be further explained in the fourth chapter.

Terhechte expressed the concern that if national courts were to start applying EU competition law rules, the result would be that the interpretation of competition rules could not be subjected to control in many situations, which would lead to differentiation.⁶¹ He found that from the perspective of uniform application of European law, this scenario remains problematic.⁶² However, this issue is not as serious as to justify a total negation of private enforcement. It could be solved by providing more training for the national judges on competition law.

In contrast, Jones argues that Wils' arguments contra private enforcement would seem more suited for a policy debate where there must be a choice made between only public enforcement or only private.⁶³ However, nothing of the like was ever suggested by the Commission or other commentators.

⁵⁹ W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' 26(3) *World Competition* (2003), p. 488.

⁶⁰ U. Böge and K. Ost, 'Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives', 27(4) *ECLR* (2006), p. 198.

⁶¹ J.P. Terhechte, 'Enforcing European Competition Law – Harmonizing Private and Public Approaches in a More Differentiated Enforcement Model' in J. Basedow, J.P. Terhechte and L. Tichy (eds.), *Private Enforcement of Competition Law* (Nomos, 2011), p. 18.

⁶² *Ibid*, p. 18.

⁶³ C.A. Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check', 27(1) *World Competition* (2004), p. 19.

Therefore, eventually Wils backed down from his harsh position regarding the (non-)necessity of private enforcement. Instead, like Komninos earlier, he also formulated three tasks that enforcement of antitrust law pursues,⁶⁴ and continued by comparing the effectiveness of two enforcement methods in relation to these tasks. He concluded that public antitrust enforcement is the superior instrument to pursue the objectives of clarification and development of the law and of deterrence and punishment, whereas private actions for damages are superior for the pursuit of corrective justice through compensation.⁶⁵

To conclude from the above, it is not an option for the Member States to exchange public enforcement for private enforcement, but instead, they should provide for deterrent administrative sanctions and facilitate private damages actions.⁶⁶ However, in the discussions about how the interaction between private and public enforcement should best be described, there is one thing that cannot be denied – the EU model of enforcement of competition rules is predominantly an administrative one and that this is not likely to change. How private damages actions fit into this system is the topic handled in the next chapter.

⁶⁴ W.P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 32(1) *World Competition* (2009), p. 5: the enforcement of antitrust prohibitions involves three tasks: (1) clarifying and developing the content of the prohibitions, (2) preventing violations of these prohibitions, in particular through deterrence and punishment, and (3) dealing with the consequences when violations have nevertheless happened, in particular by providing compensation to achieve corrective justice.

⁶⁵ W.P.J. Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 32(1) *World Competition* (2009), p. 12.

⁶⁶ M.J. Frese, 'Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability', 34(3) *World Competition* (2011), p. 408.

3 Functions of Private Enforcement in the Antitrust Enforcement System

To begin tackling this matter, it is important to establish what the objectives are that the enforcement of competition law fulfils. Komninos on this point brings out three objectives-functions, which according to him are systematically different and yet substantively interconnected.⁶⁷ The first one is injunctive, i.e. to bring the infringement of the law to an end, which may entail not only negative measures, in the sense of an order to abstain from the delinquent conduct, but also positive ones to ensure that such conduct cease in the future. The second objective-function is restorative or compensatory, i.e. to remedy the injury caused by the specific anti-competitive conduct. The third one is punitive, i.e. to punish the infringer and also to deter him and others from future infringements.⁶⁸ In an ideal enforcement system, these three functions are pursued with a combination of both public and private elements.

However, as the system now stands, there is very little regulation regarding the matter of how the two enforcement methods interact with each other in practice. This is true even though there are widely recognised areas where the interests of public and private enforcement potentially collide.⁶⁹ Commission is clearly worried and not sure itself how to address the relationship between private and public enforcement. Quite recently in the Commission Staff Working Document, *Towards a Coherent European Approach to Collective Redress* (Collective Redress Working Document), the Commission consults stakeholders on this matter.⁷⁰ Regardless of the Commission's efforts, from the perspective of this thesis, it is indispensable to determine what functions private damages actions fill in the overall enforcement system.

It has been argued from the start that private enforcement primarily serves the restorative-compensatory objective, meaning that these private actions

⁶⁷ A.P. Komninos, 'Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari', 16th Annual EU Competition Law and Policy Workshop 'Integrating public and private enforcement of competition law: Implications for courts and agencies', Florence, 17-18 June 2011, p. 2. Available at <http://ssrn.com/abstract=1870723>

⁶⁸ Ibid, p. 2

⁶⁹ J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) European Competition Journal (2009), p. 537.

⁷⁰ SEC(2011)173, 04.02.2011. Questions included: Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved?

ensure compensation for those harmed by anti-competitive conduct.⁷¹ The role of public enforcement here can only be minimal.

In addition to the compensatory function, private enforcement serves a number of other functions. First, it eases the burden on competition authorities, as due to limited resources these have to make choices which cases to take on. Thus, private litigants help to close gaps in the overall competition enforcement system. In addition, the considerable number of private law proceedings contributes to further developing antitrust law. Finally, the possible accumulation of fines and claims for damages enhances deterrence and thereby strengthens the overall antitrust culture.⁷²

3.1 Compensation v. Deterrence

The Commission in its Green Paper followed the Court's line of argumentation, when it expressed that both public and private enforcement are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them.⁷³ Private as well as public enforcement of antitrust law were seen as an important tool to create and sustain a competitive economy.⁷⁴ At that point, it was clear that the Commission looked at private enforcement as a mere enforcement tool to increase deterrence. As stated earlier, the Commission changed its view on damages actions in the White Paper, but still did not let go of the deterrence as one function of these actions.

Commentators have argued that the main purpose of private enforcement is the attainment of corrective justice through compensation: the possibility to obtain redress is not (only) to act as deterrent, but rather to make good for any losses the infringement has caused on the part of any innocent victim.⁷⁵ Under this view, deterrence is just a socially beneficial by-product of such damages claims as it increases the probability of detection and the expected cost of violations.⁷⁶ Also, the main difficulty with an approach to damages actions focusing on deterrence and punishment is that it would become an alternative, rather than a complement, to public enforcement.⁷⁷ However, this is not the outcome, which competition law should be striving for.

⁷¹ A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart, 2008), p. 8.

⁷² U. Böge and K. Ost, 'Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives', 27(4) ECLR (2006), p. 197.

⁷³ Green Paper, s. 1.1.

⁷⁴ *Ibid.*, s. 1.1.

⁷⁵ P. Nebbia, 'Damages actions for the infringement of EC competition law: compensation or deterrence?' 33(1) ELRev. (2008), p. 26.

⁷⁶ *Ibid.*, p. 26.

⁷⁷ E. Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003', Community Report to the FIDE Congress 2008, p. 132.

All in all, it is not correct to view public and private enforcement as pursuing separate goals (principally deterrence in the case of the former and compensation in the case of the latter), as they work jointly towards achieving the ultimate goal of enforceability of antitrust rules, under which both compensation and deterrence are subsumed.⁷⁸

3.2 Complementarity

While it is sometimes argued that private enforcement cannot make a substantial contribution to competition law enforcement,⁷⁹ mainstream antitrust scholars still see the ideal antitrust enforcement model combining both public and private elements. The reason for this is that each of the two systems aims at different aspects of the same phenomenon, hence they are to be seen as complementary and necessary for the effectiveness of the whole competition law enforcement.⁸⁰

The current view of the Commission on the matter of complementarity of private enforcement in relation to public enforcement is expressed in the White Paper. As opposed to the Green Paper where deterrence was emphasised, in the White Paper, the right to full compensation of the victims was set out as the goal. Regarding the relationship between the two enforcement methods, it is stated that those measures in the White Paper are designed to create an effective system of private enforcement by means of damages actions that complements, but does not replace or jeopardise, public enforcement.⁸¹ Thus, it is clear that the Commission looks at the right of victims of a competition law infringement to bring an action for damages as being also in the public interest.⁸² It can be concluded from this that the Commission really does see private and public enforcement working towards the same goal of optimal antitrust enforcement.

The Court's standpoint has been consistent in its case law, as it has acknowledged that individual damages actions strengthen the working of the Union competition rules and can make a significant contribution to the maintenance of effective competition in the Union.⁸³ This is a case where

⁷⁸ J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) *European Competition Journal* (2009), p. 546.

⁷⁹ This is said especially by public enforcement officials; see most notably W.P.J. Wils, 'Should Private Antitrust Enforcement Be Encouraged in Europe?' 26(3) *World Competition* (2003).

⁸⁰ A.P. Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' 3(1) *CompLRev.* (2006), p. 10.

⁸¹ White Paper, s. 1.3.

⁸² Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404, 02.04.2008, para. 322; (hereinafter 'Staff Working Paper').

⁸³ Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, para. 27; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para. 91; Case C-360/09 *Pfleiderer* [2011] n.y.r., para. 29; see also, Case C-253/00 *Muñoz and Fruiticola* [2002] ECR I-7289, para. 30.

the private interest contributes to the safeguarding of the public interest, so no antimony should exist. Thus, private actions should not be seen as altering the substance of EU competition law, which is the protection of the public interest.⁸⁴

To understand where and why the notion of complementarity comes into play, the benefits of both enforcement methods will briefly be presented. First argument for private enforcement is that it is not politically influenced. Furthermore, it enhances awareness of competition law of private market actors. When private claimants do bring an action, their specific market knowledge can be made use of.⁸⁵ Additionally, the possibility of receiving compensation contributes positively to the critical risk level of private actors. In the antitrust context, this is a worthy goal as both competitors and customers can conduct their operations in the most efficient manner based on relative indifference to antitrust violations due to the credible promise of compensation.⁸⁶ Moreover, damages actions have deterrence as a beneficial side effect.⁸⁷ These factors brought out here are the most important when it comes to the justifications of the complementary existence of private enforcement to act as a safeguard against potential insufficiencies in public enforcement.

However, private enforcement does not constitute a systematic, methodical approach. That is where the pros of public enforcement come into play by offering better methods of investigation and detection of infringements. Furthermore, the costs of information and transaction are lower, one of the reasons for this being that more specialized units decide.⁸⁸ However, even the lower costs do not help with the fact that in reality public enforcement has limited finances and is hindered by other factors, such as agency problems and political economy.⁸⁹ Thus, it becomes apparent that for an optimal enforcement system, both public and private enforcement are necessary, as they help to overcome each other's flaws and do work for the same ultimate goal of effective competition in the market.

Nevertheless, the discussion is not over with the simple finding of complementarity, because this complementarity has its limitations. There

⁸⁴ A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart, 2008), p. 14.

⁸⁵ P. Pohlmann, 'Private Losses in European Competition Law: Public or Private Enforcement?' in R. Schulze (ed.), *Compensation of Private Losses: The Evolution of Torts in European Business Law* (European Law Publishers, 2011), pp. 157-158.

⁸⁶ J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) *European Competition Journal* (2009), p. 525.

⁸⁷ J.S. Kortmann and Ch.R.A. Swaak, 'The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic', 30(7) *ECLR* (2009), p. 341.

⁸⁸ P. Pohlmann, 'Private Losses in European Competition Law: Public or Private Enforcement?' in R. Schulze (ed.), *Compensation of Private Losses: The Evolution of Torts in European Business Law* (European Law Publishers, 2011), pp. 157-158.

⁸⁹ J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) *European Competition Journal* (2009), pp. 526.

are several possible scenarios where actions of individuals, taken in furtherance of their own private interests, may be of little use to the overall goal of effective enforcement and may actually harm it. Equally, one could envisage circumstances whereby public enforcement efforts harm the protection of private rights and/or interests.⁹⁰ These two scenarios will further be developed in the fourth chapter of this thesis.

Komninos sums up the complementarity argument by finding that an effective system of private enforcement does not alter the basic goal of the competition rules, which is to safeguard the public interest in maintaining a free and undistorted competition, and should by no means be thought of as antagonistic to the public enforcement model. Therefore, it should be possible for the two models to work to complement each other.⁹¹

3.3 Filling the Enforcement Gap

A further advantage is that the weakness of public enforcement, most notably the ‘enforcement gap’ generated by the perceived inability of public enforcement to deal with all attention-worthy cases, are counter-balanced by strengthening private enforcement. Another advantage may be that a mixed public-private system of antitrust enforcement may lead to a more balanced way of enforcing the competition rules, thus avoiding the more intervention-oriented approach of a system where public agencies are the exclusive enforcers.⁹²

On the other hand, not everyone agrees that just because all antitrust violations are not detected and punished, it justifies the conclusion that private actions for damages would be needed to fill a deterrence gap, because most probably it is not even in the general interest.⁹³ Wils argues that rather it is important that the expected penalty exceeds the expected gains coming from the antitrust infringements.⁹⁴

Furthermore, it is important to stress that not every infringement of the EU competition law rules causes harm. Therefore, there is a need for an enforcement system, which is not conditional on the existence of any harm.

⁹⁰ V. Milutinović, *The ‘right to damages’ under EU competition law: from Courage v. Crehan to the White Paper and beyond* (Kluwer Law International, 2010), p. 16.

⁹¹ A.P. Komninos, ‘Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari’, 16th Annual EU Competition Law and Policy Workshop ‘Integrating public and private enforcement of competition law: Implications for courts and agencies’, Florence, 17-18 June 2011, p. 8. Available at <http://ssrn.com/abstract=1870723>

⁹² A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart, 2008), p. 10.

⁹³ See, for example, W.P.J. Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’, 32(1) *World Competition* (2009), p. 10.

⁹⁴ W.P.J. Wils, ‘Optimal Antitrust Fines: Theory and Practice’, 29(2) *World Competition* (2006), p. 190.

However, the traditional distinction⁹⁵ has the effect that a claim for damages is generally conditional on the establishment of harm (what else is there to compensate?).⁹⁶ On the other hand, public enforcement of antitrust law does not require that a specific infringement cause actual harm to a person in order to prohibit it; it is sufficient that the object of the agreement is anti-competitive. In addition, due to the *de minimis*⁹⁷ rules, an agreement might cause harm, but still not be considered anti-competitive because it does not have an appreciable effect on the competition in the market.⁹⁸ This means that even when the two enforcement methods are both equally accessible, there are cases in which only one of them can be used.

The conclusion from the above must be that it is not possible to exchange public enforcement for private enforcement due to their specific characteristics and the complementary but different functions they have to fulfil. Therefore, both enforcement methods are indispensable to guarantee an effective and optimal enforcement system. How to balance the two methods in order to achieve such a system is another matter.

⁹⁵ By the traditional distinction is meant that private enforcement has a compensatory function and public enforcement serves the objective of deterrence.

⁹⁶ M.J. Frese, 'Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability', 34(3) *World Competition* (2011), p. 412.

⁹⁷ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ C 368, 22.12.2001.

⁹⁸ A.P. Komminos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' 3(1) *CompLRev.* (2006), pp. 14-15.

4 Interaction between Private and Public Enforcement after the Harmonisation

The White Paper addressed several issues in relation to private damages actions, which are not all relevant to the interaction of private and public enforcement. There are four key issues, which illustrate best how the two enforcement methods are meant to interact with each other if the proposals made by the Commission become hard-law in the form envisaged in the White Paper.

The first is the issue of binding effect of NCA decisions, as in addition to facilitating follow-on actions for damages, it also gives some of the control over which cases will be pursued by private actors to public administrators.⁹⁹ Second, the matter of leniency is probably the area, where public enforcement will suffer the most due to the strengthening of private enforcement. This is due to the fact that once the leniency applicant becomes publicly known, it is an easy target for the victims to bring to court, thereby decreasing the attractiveness of leniency programmes. The third issue is partly related to the second, as the danger of victims accessing the competition authorities' files could seriously threaten leniency programmes. By giving private parties the possibility of disclosure *inter partes* in civil claims, leniency applicants will be less exposed. As the fourth matter, the relationship between fines and damages will be examined. It cannot be denied that after the harmonisation, the number of private damages actions is expected to grow, which brings with it greater financial distress for the infringers, thus making coordination necessary.

4.1 Binding Effect of NCA Decisions

At the moment, according to Article 16(1) of Regulation 1/2003 only the decisions of the Commission regarding infringements of Articles 101 and 102 TFEU have binding effects on national competition authorities and national courts. The idea brought forward in the White Paper would extend this binding effect also to the decisions made by national competition authorities. The Commission worded the rule as follows:

‘National courts that have to rule in actions for damages on practices under Article 81 or 82 on which an NCA in the ECN has already given a final decision finding an infringement of those articles, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling.’¹⁰⁰

⁹⁹ The possibility of bringing a stand-alone claim still exists.

¹⁰⁰ White Paper, s. 2.3.

The principle of binding effect of Commission decisions was developed by the Court in the *Masterfoods*¹⁰¹ decision. Therefore, when the Commission was drafting the Regulation 1/2003 it got the inspiration and ‘permission’ from the Court for wording the binding effect provision as it did. When the time came to draft the White Paper on damages actions, the Commission dared to go even a step further and make decisions of NCAs also binding. It can be speculated that this provision was lobbied for very strongly by Germany, who has had such a provision – § 33(4) GWB¹⁰² – in force already from 2005.

As to the wording of the provision, it must be noted that the Commission made a conscious decision when it used the expression ‘cannot take decisions running counter to’ instead of ‘binding’. This can be traced back to the *Masterfoods* judgment, where the Court did not use the word ‘binding’ either.¹⁰³ Komninos concluded from this selection of the expression by the Court that national courts must not always consider themselves positively bound by Commission decisions.¹⁰⁴ There is no reason why the same conclusion should not be applicable in relation to the binding effect of NCA decisions. The issue of the scope of the binding effect will be explained further below.

The rationale behind the idea of making NCA decisions also binding could be explained by the principle of economy in legal proceedings, which makes it inappropriate to repeat parts of the procedure before a civil generalist court, if a specialist authority or court has already dealt with the same facts.¹⁰⁵

4.1.1 Scope of Binding Effect

The question now arises that where a previous relevant decision has been taken by a national competition authority, how far does a court, in front of which a damages claim is being tried, have to follow?

The Commission gave an explanation regarding this question and stated that the probative effects of a NCA decision are confined to the scope of the decision.¹⁰⁶ The Commission explained that this limitation covers the

¹⁰¹ Case C-344/98 *Masterfoods* [2000] ECR I-11369.

¹⁰² Gesetz gegen Wettbewerbsbeschränkungen vom 15. Juli 2005 (BGBl. I S. 2114; 2009 I S. 3850), § 33(4): ‘Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority or court acting as such in another Member State of the European Community’.

¹⁰³ See, Case C-344/98 *Masterfoods* [2000] ECR I-11369, paras. 51-52.

¹⁰⁴ A.P. Komninos, ‘Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight’, 44(5) CMLRev. (2007), p. 1393.

¹⁰⁵ A.P. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ 3(1) CompLRev. (2006), p. 17.

¹⁰⁶ Staff Working Paper, para. 154.

material (same agreement, decisions or practices), personal (same infringers) and also the territorial scope of the decision.¹⁰⁷ Thus, a decision of a NCA finding an infringement of Articles 101 or 102 TFEU can only refer to those anticompetitive effects that took place within the jurisdiction of that NCA.¹⁰⁸ In the Staff Working Paper, it was made clear that this latter territorial limitation does not however influence the possibility of using the NCA decision from one Member State as proof of infringement in a civil claim in another Member State.¹⁰⁹

This limitation in scope is not always unproblematic and may raise questions whether it makes sense to interpret the personal and material scope strictly in all cases. For example, in cases of distribution networks, where one distributor complains about the terms, the binding effect of the NCA decision would cover only the particular agreement. However, this could be questionable when all distribution agreements are ‘identical’ and/or when the NCA decision on the particular complaint includes findings touching upon anticompetitive practices relevant throughout the network of distributors.¹¹⁰

Although no such clarification is included in the Staff Working Paper, it should undoubtedly be accepted that the claimant filing for an action at a time when the NCA decision has not yet become final may still use this NCA decision as evidence of the infringement.¹¹¹ The national court in front of which the case is being tried will be free to assess the probative value of the NCA decision. Based on this assessment the civil court may choose to follow the NCA’s finding on the basis of its *de facto* persuasive authority. However, there is no binding effect on the civil court during that time and the court may deviate as it deems appropriate.

One further point clarified in the Staff Working Paper is that a decision made by a NCA is only binding as far as it finds an infringement.¹¹² Meaning that if a NCA accepts commitments by companies instead of proceeding to a finding of infringement, and closes the administrative proceedings, then it does not affect the national civil courts, which remain free to decide whether or not there has been an infringement of Union competition law.¹¹³

¹⁰⁷ J. Drexl et al., ‘European Commission – White Paper: Damages Actions for Breach of the EC Antitrust Rules’, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-07, p. 6.

¹⁰⁸ Ibid, p. 6.

¹⁰⁹ Staff Working Paper, para. 162.

¹¹⁰ E. Truli, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules: the Binding Effect of Decisions Adopted by National Competition Authorities’, 5(3) European Competition Journal (2009), p. 808.

¹¹¹ Ibid, p. 802.

¹¹² Staff Working Paper, para. 153.

¹¹³ A.P. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ 3(1) CompLRev. (2006), p. 20.

4.1.2 Implications of Binding Effect

One of the most important benefits achieved by extending the binding effect from only Commission decisions to final decisions of (domestic and foreign) NCAs in the European Competition Network (and as has already been enacted in some Member States), is that follow-on actions for damages will be further assisted.¹¹⁴

The burden on the claimants will be eased, as in the follow-on action they only need to establish the harm they have suffered and the causal link between the infringement and this harm.¹¹⁵ Nevertheless, the potential claimants need to take into account the limitations of the scope of the binding effect of NCA decisions, as noted above.

The Commission sees the benefit of encouraging follow-on actions as offering the best guarantees in preventing abusive litigation and preserving the effectiveness of public enforcement, because these actions are brought only against companies that a public authority has already found guilty of infringing EU law.¹¹⁶ Thus, this would count as an indirect advantage deriving from the binding effect of NCA decisions.

There are advantages also for the national courts, as the binding effect of foreign NCAs will relieve them from the difficult task of having to make investigations abroad in order to establish the existence and scope of an infringement in cross-border situations.¹¹⁷ Moreover, the commentators agree on that the binding effect of NCA decisions will procure cost- and time-saving benefits, will reduce the risk for the claimant and thus encourage follow-on antitrust litigation, and will enhance legal certainty and the uniform application of EU competition law by precluding conflicting decisions issued by administrative and civil courts.¹¹⁸

However, not all commentators see the increasing number of follow-on actions as something positive. Wilsher finds that the ‘free-rider’ problem is serious in this area, as many large companies seek to use public authorities to do the hard work of enforcement for them.¹¹⁹ This on its turn distorts the ‘market’ for competition enforcement because it reduces the costs that firms

¹¹⁴ Editorial Comment ‘A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules’, 45(3) CMLRev. (2008), p. 612.

¹¹⁵ W.P.J. Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’, 32(1) World Competition (2009), p. 16.

¹¹⁶ J. Almunia, ‘Public enforcement and private damages actions in antitrust’, 22 September 2011, SPEECH/11/598. Available at

<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/598>

¹¹⁷ J. Drexel et al., ‘European Commission – White Paper: Damages Actions for Breach of the EC Antitrust Rules’, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-07, p. 7.

¹¹⁸ E. Trulli, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules: the Binding Effect of Decisions Adopted by National Competition Authorities’, 5(3) European Competition Journal (2009), p. 812.

¹¹⁹ D. Wilsher, ‘The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture’, 3(1) CompLRev. (2006), p. 42.

have to pay for enforcement without adequate justification, hence altering the risk-reward calculus that every litigant has to engage in.¹²⁰ Nevertheless, this concern is hard to understand, as in the context of competition law enforcement, it is the task of the NCA to find the infringers and punish them. The NCA has this assignment regardless of whether or not there is a large company who can bring a follow-on action.

4.1.3 Potential Concerns

At this point, it is important to bring out the argument made by Komninos, who was not always convinced that benefits of the binding effect outweigh the negative sides. He claimed that allowing litigants to rebut the presumption established by an infringement decision would enrich national litigation, as national civil courts could be fully involved in the application of substantive competition law and would not be turned into mere assessors of damages.¹²¹ However, Komninos' concerns about the weakened position of national courts in competition law matters have changed, as he conceded in his latest article that he also understands benefits for claimants gained from not having to re-argue the case in civil court.¹²² Furthermore, he admitted that when a competition authority has decided in a judicially-reviewable final decision that there has been an infringement, there is a valid reason for not allowing the defendant to challenge anew this cardinal finding.¹²³ However, he still remains sceptical about giving unqualified binding effect to administrative decisions and pleads for a rebuttable presumption of antitrust liability.

The second concern is that the binding effect works only in one direction, meaning that NCA decisions are binding on civil courts but not the other way around. Thus, when a claimant has brought a stand-alone action for damages, where the national court has found to be a competition law infringement, then it does not automatically oblige or give a right to the NCA to fine the infringer. However, when considering the limited resources of public enforcers, the latter need to retain their discretion whether to start proceedings or not. In addition, the *de minimis* rules also set a limit to the cases in which proceedings can be brought. Therefore, it is necessary that the binding effect only works in one way.

Thirdly, it cannot be ignored that there are different standards of proof, procedural rights and review mechanisms of NCA decisions in the Member States. In relation to this, commentators have expressed the fear that the

¹²⁰ Ibid, p. 42.

¹²¹ A.P. Komninos, 'Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight', 44(5) CMLRev. (2007), p. 1428.

¹²² See, A.P. Komninos, 'Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari', 16th Annual EU Competition Law and Policy Workshop 'Integrating public and private enforcement of competition law: Implications for courts and agencies', Florence, 17-18 June 2011, p. 12. Available at <http://ssrn.com/abstract=1870723>

¹²³ Ibid, p. 12.

binding effect rule could encourage undesirable forum shopping.¹²⁴ Even if there is a danger of forum shopping, there could be measures taken to avoid this possibility without jeopardizing the binding effect of NCA decisions.

Fourth, fears exist regarding practical difficulties in the implementation of this binding effect rule, which relate to the fact that national courts would have to tackle the problem of decisions written in a foreign language and against the background of a different legal system and culture.¹²⁵ These minor difficulties should however not hinder potential claimants or national courts from using foreign NCA decisions in civil claims.

As a conclusion from the concerns given, one can see that these are mostly related to procedural issues. However, these should not discourage the Commission from proceeding with the idea of giving binding effect to NCA decisions. Nevertheless, these issues still need to be taken into consideration and a solution for these has to be developed along with the new directive.

4.2 Leniency

The general idea behind leniency programmes in antitrust enforcement is to grant immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities.¹²⁶

In Europe, the rather under-developed state of private enforcement was not considered to deter companies from applying for leniency, so until very recently no case had been made for imposing limitations on private actions in cases of leniency applications.¹²⁷ However, when the Commission set out to strengthen private enforcement actions, it had no choice but to tackle the issues arising from the concurrent existence of leniency programmes and private actions for damages.

4.2.1 Relationship between Leniency Programmes and Damages Claims

As a general starting point, it is important to understand that the issue of reduction of fines must be distinguished from the compensation issue.

¹²⁴ E. Truli, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules: the Binding Effect of Decisions Adopted by National Competition Authorities', 5(3) *European Competition Journal* (2009), p. 814.

¹²⁵ *Ibid.*, p. 815.

¹²⁶ W.P.J. Wils, 'Leniency in Antitrust Enforcement: Theory and Practice', 30(1) *World Competition* (2007), p. 25.

¹²⁷ A.P. Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' 3(1) *CompLRev.* (2006), p. 21.

Otherwise, linking the two would amount to a contract at the expense of third parties (the victims) between the authority and the wrongdoer.¹²⁸

The European Commission in the Leniency Notice took the separation of the two notions into account when it explicitly stated that the ‘fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC’¹²⁹ (now Article 101 TFEU).

However, ever since the Court recognised the right of ‘any individual’ to obtain compensation for damage suffered due to an infringement of the EU competition rules and the active promotion of private enforcement actions by the Commission, the risk of exposure for leniency applicants has been increasing continuously.¹³⁰ It is therefore understandable that it may discourage cartel participants from applying for leniency, which would significantly impede the discovery and punishment of cartels, which in turn would lead to a lower degree of compensation of cartel damage.¹³¹ Hence, by trying to advance private enforcement actions, the Commission might be doing the victims a disservice instead, if it fails to come up with a solution, which would satisfy leniency applicants and at the same time still be helpful in private damages actions.

Another reason why private enforcement is making leniency programmes risky for undertakings, is because after applying for leniency the cartel offenders become publicly known. Thus, when potential claimants want to sue the infringers, they are able to identify the infringing undertakings and go to court themselves.¹³² Furthermore, it can hardly be denied that the more likely competition law offenders have to pay damages, the less they will be inclined to make their breach of competition law known to any public authority.¹³³ In this situation, it is clear that private enforcement of competition rules would hinder public enforcement, which is nowadays relying heavily on discovery through leniency programmes.

¹²⁸ J. Drexel et al., ‘European Commission – White Paper: Damages Actions for Breach of the EC Antitrust Rules’, Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-07, p. 13.

¹²⁹ Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 08.12.2006, para. 39.

¹³⁰ A. Riley, ‘The Modernisation of EU Anti-cartel Enforcement: Will the Commission Grasp the Opportunity?’ 31(5) ECLR (2010), p. 195.

¹³¹ C. Cauffman, ‘The Interaction of Leniency Programmes and Actions for Damages’, 7(2) *ComPLRev.* (2011), p. 183.

¹³² J.P. Terhechte, ‘Enforcing European Competition Law – Harmonizing Private and Public Approaches in a More Differentiated Enforcement Model’ in J. Basedow, J.P. Terhechte and L. Tichy (eds.), *Private Enforcement of Competition Law* (Nomos, 2011), p. 20.

¹³³ Editorial Comment ‘A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules’, 45(3) *CMLRev.* (2008), p. 614.

The concerns grow even bigger, because when a firm files a successful application for immunity, it is exposed, at least temporarily, to the risk of being held liable under civil law for the entire cartel.¹³⁴ Such a firm is likely to be the primary or even exclusive target of private damages actions, as this firm is often the only cartel member not contesting the existence and illegality of the cartel.¹³⁵ Therefore, cartelists who refuse to cooperate with the authorities or who only submit enough evidence to achieve a reduction of the fine rather than full immunity may therefore be better off, in terms of civil liability, than the successful applicant for immunity.¹³⁶ This is reducing incentives of infringers to file for leniency as the first applicant, which is the most crucial for the discovery of a cartel.

Eilmansberger finds that the argument that an increased threat of damages claims does not fundamentally affect the prisoners' dilemma faced by cartel members lacks substance.¹³⁷ He explains that the risk of a successful follow-on damages claim being brought changes the overall calculations of a potential leniency applicant, as any advantage gained with regard to administrative fines would be outweighed by the disadvantage created by a the damages payment in civil actions.¹³⁸

4.2.2 Protecting Corporate Statements

As can be concluded from the above, it is exactly the threat of follow-on claims that can discourage whistle blowers from making use of leniency programmes.¹³⁹ The Commission wants to take action in order to avoid this consequence. Therefore, The Commission has explicitly stated on two occasions in the White Paper that claimants should not have a right to access (at any point in time) the so-called 'corporate statements' made by all (successful and unsuccessful) leniency applicants.¹⁴⁰ This would limit the threat of exposure of all leniency applicants and thereby the Commission hopes to keep the leniency programmes attractive.

It can be deduced from this that the Commission values the leniency programme above all, but there is also a more pragmatic reason behind this

¹³⁴ T. Eilmansberger, 'The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action', 44(2) CMLRev. (2007), p. 436.

¹³⁵ Ibid, p. 436.

¹³⁶ F.W. Bulst, 'Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law', 2/2008 Bucerius Law Journal, p. 88.

¹³⁷ T. Eilmansberger, 'The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action', CMLRev. 44(2) 2007, p. 436.

¹³⁸ Ibid, p. 436.

¹³⁹ See also, D. Waelbroek and D. Slater, 'The Commission's Green Paper on Private Enforcement: 'Americanization' of EC Competition Law Enforcement?' in C.-D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart, 2007), pp. 431-432.

¹⁴⁰ White Paper, s. 2.2. in 'Access to evidence' and also in s. 2.9 'Interaction between leniency programmes and actions for damages'.

exclusion of corporate statements. Namely, if companies had not blown the whistle, meaning that they had not made this corporate statement in the first place, then this document had not existed and no one would have had access to it. Therefore, in such a situation, it cannot be unfair to deny claimants in civil proceedings the right to obtain the corporate statement; whereas the protection against disclosure of these documents may make leniency programmes more attractive, thus facilitating public enforcement for the purpose of deterrence and punishment.

In essence, the Commission has argued that discovery of corporate statements and related Commission materials would undermine the leniency programmes and thereby also the effective enforcement of EU competition law. This is because companies would be deterred from submitting leniency applications if they run the risk that the self-incriminating information they supply in order to obtain immunity would be handed over to private plaintiffs suing them for damages.¹⁴¹ Therefore, the Commission is understandably advocating a strong protection of corporate statements made by leniency applicants. Moreover, this is a perfect example of a situation where the public and private interests have been weighed against each other with the result of public interest prevailing at the end.

4.2.3 Reducing Civil Liability

The Commission also considers rewarding successful applicants by limiting their civil liability to claims by their direct and indirect contractual partners. The Commission finds that this would help to make the scope of damages to be paid by immunity recipients more predictable and more limited, without unduly sheltering them from civil liability for their participation in an infringement.¹⁴² However, the commentators do not support the approach the Commission has chosen according to which leniency programmes prevail over the principle of full compensation for victims.

First, Komninos finds that this question of reducing the civil liability of successful leniency applicants goes to the core of the relationship between public and private enforcement. Furthermore, the objectives and functions of private antitrust damages actions have a decisive role to play in determining whether liability should be reduced or not. He explains that, if the paramount objective-function is compensation, then limiting liability will be difficult; if, however, deterrence is also an objective-function, it will be easier to protect the integrity and attractiveness of the leniency programme by limiting civil liability.¹⁴³

¹⁴¹ I. Vandenborre, 'The Confidentiality of EU Commission Cartel Records in Civil Litigation: the Ball is in the EU Court', 32(3) ECLR (2011), p. 116.

¹⁴² White Paper, s. 2.9.

¹⁴³ A.P. Komninos, 'Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari', 16th Annual EU Competition Law and Policy Workshop 'Integrating public and private enforcement of competition law: Implications for courts and agencies', Florence, 17-18 June 2011, p. 14. Available at <http://ssrn.com/abstract=1870723>

Second, Bulst contends that the Commission in the White Paper attempts to strike a balance between the desire not to disadvantage leniency applicants vis-à-vis other infringers and the aim of not unduly protecting the leniency applicant from the civil law consequences.¹⁴⁴ However, Hodges maintains that it is practically impossible to reconcile the fundamentally different approaches of a ‘leniency programme’ and a private litigation model.¹⁴⁵ First of all, because a leniency programme policy is a sensible tool of a regulator, and virtually incapable of being integrated into a privatized and court adjudicated enforcement system. Secondly, private litigation model would lead to independent decisions being taken by countless judges and authorities across the Member States, and the prospect of achieving consistency in such complex subject matter would be unattainable.¹⁴⁶

Third, this proposal would lead to a somewhat questionable result. Namely, that the only persons entitled to receive compensation from the immunity recipient are those who directly bought the cartelised products or services from the immunity recipient (i.e. direct contractual partners), or those further down the supply chain who bought these products or services (directly or through intermediaries) from the direct contractual partners (i.e. indirect contractual partners).¹⁴⁷ Komninos is not satisfied with the proposal the Commission made in the White Paper and contends that the problem is the proposal to bar totally certain classes of individuals from claiming damages against an undertaking that has infringed Article 101 TFEU.¹⁴⁸ It would mean that a victim that fails to qualify for either of the categories mentioned and, more importantly, a harmed competitor will not be able to claim damages from the successful leniency applicant.¹⁴⁹

Fourth, Komninos strongly advocates the idea that public enforcement by the Commission and its intention to facilitate detection through immunity of fines should not function to the detriment of private enforcement and the compensation of cartel victims.¹⁵⁰ This approach was accepted in the Leniency Notice as well. Therefore, the option chosen by the Commission in the White Paper to limit the civil liability in this manner seems all the more uncertain as to its legitimacy. Komninos also questions whether the limitation of the right of competitors and others not falling under the Commission’s definition of ‘direct and indirect contractual partners’ is compatible with primary EU law, i.e. with the Treaty itself and the Court’s

¹⁴⁴ F.W. Bulst, ‘Of Arms and Armour – The European Commission’s White Paper on Damages Actions for Breach of EC Antitrust Law’, 2/2008 *Bucerius Law Journal*, p. 91.

¹⁴⁵ C. Hodges, ‘Competition Enforcement, Regulation and Civil Justice: What is the Case?’ 43(5) *CMLRev.* (2006), p. 1390.

¹⁴⁶ *Ibid.*, p. 1390.

¹⁴⁷ See, Staff Working Paper, para. 305.

¹⁴⁸ A.P. Komninos, ‘Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari’, 16th Annual EU Competition Law and Policy Workshop ‘Integrating public and private enforcement of competition law: Implications for courts and agencies’, Florence, 17-18 June 2011, p. 17. Available at <http://ssrn.com/abstract=1870723>

¹⁴⁹ See, *ibid.*, p. 17.

¹⁵⁰ A.P. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ 3(1) *CompLRev.* (2006), p. 21.

rulings in *Courage* and *Manfredi*, which stress that the right to damages should be open to ‘any individual’.¹⁵¹ Wils generally supports this view and concludes that granting leniency recipients immunity from damages or any reduction of their liability in follow-on actions for damages would appear unnecessary and unjust.¹⁵²

Finally, these arguments supporting damages actions over leniency have not convinced everyone though. Some authors have even gone as far as advocating a complete immunity from damages claims of successful leniency applicants. Riley argues that there is no loss to any plaintiff from immunity for the defendant leniency applicant. He explained that not only is immunity valuable as a matter of Union public policy, as without immunity applicants anti-cartel detection and enforcement is substantially undermined, but as a matter of logic without leniency applicants there can be no damages claims.¹⁵³ He found that these two arguments together provide a powerful argument for the Court of Justice to provide an exception to the right to real and effective judicial protection in EU law. However, Riley’s view has not received support and it is in no way in coherence with the Court’s consistent case law, which gives the right to damages to ‘any individual’.

4.3 Access to Evidence

The reason behind introducing the access to evidence clause in the White Paper is that the Commission wants to overcome the structural information asymmetry between the parties of the civil claim.¹⁵⁴ It is clear that private claimants who are acting collectively or on their own do not have the same access to evidence as public authorities. Therefore, in order to assist the private claimants to prove the factual basis necessary for a claim under Article 101 and 102 TFEU, the Commission in the White Paper suggested a minimum harmonization of procedural laws.

As mentioned above, one of the aims of the White Paper set out by the Commission is to ease the possibility of bringing follow-on actions for damages. One of the mechanisms for achieving this goal would be to allow the claimants to have right to disclosure *inter partes* for EU antitrust damages cases. Even if claimants do not need to prove the existence of the competition law infringement anymore (due to the binding effect of the NCA and the Commission’s decision), they still need information, which

¹⁵¹ A.P. Komninos, ‘Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari’, 16th Annual EU Competition Law and Policy Workshop ‘Integrating public and private enforcement of competition law: Implications for courts and agencies’, Florence, 17-18 June 2011, p. 16. Available at <http://ssrn.com/abstract=1870723>

¹⁵² W.P.J. Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’, 32(1) World Competition (2009), p. 25.

¹⁵³ A. Riley, ‘The Modernisation of EU Anti-cartel Enforcement: Will the Commission Grasp the Opportunity?’ 31(5) ECLR (2010), p. 196.

¹⁵⁴ White Paper, s. 2.2.

would help to prove the extent of the harm caused by the infringer and for proving the causal link between the violation and the harm.

However, the first obstacle in creating such a mechanism of disclosure is that most Member States follow a civil law tradition, which presumes that in civil cases it is the task of the plaintiff to present all the evidence before the court. Nevertheless, three Member States follow the common law tradition,¹⁵⁵ in which notice pleading prevails: where the essential legal issues are raised in the originating process but where the plaintiff expects to be able to obtain further evidence through discovery procedures.¹⁵⁶ Thus, introducing a system where disclosure *inter partes* is allowed, is not totally new to all Member States.

The Commission's proposals on access to evidence in the White Paper, may not always be easy to integrate into some Member States' rules of procedure, however they do not seem to depart fundamentally from the continental tradition of fact pleading, i.e. the requirement that detailed facts are asserted and clearly specified means of evidence are proffered during the pleading phase of the proceedings and evidence taking by and before the judge.¹⁵⁷

4.3.1 Limited Access Only

As stated above, the Commission in the White Paper suggested that across the EU a minimum level of disclosure *inter partes* for antitrust damages cases should be ensured. However, access to evidence should be based on fact-pleading and strict judicial control of the plausibility of the claim and the proportionality of the disclosure request.¹⁵⁸

The disclosure mechanism that the Commission opted for sets out very strict conditions that need to be fulfilled before national courts can order defendants or third parties to disclose specific categories of relevant evidence. These conditions include tests of relevance and proportionality; the demand that the claimant present all the facts that show plausible grounds for his action and that he has exhausted the means of evidence reasonably available to him.¹⁵⁹ Thus, the Member States' courts will not have to permit the kind of 'fishing expeditions' the American regime of pre-trial discovery allows.¹⁶⁰

¹⁵⁵ The UK, Ireland and Cyprus.

¹⁵⁶ A. Riley and J. Peysner, 'Damages in EC antitrust actions: who pays the piper?' 31(5) *ELRev.* (2006), p. 752.

¹⁵⁷ F.W. Bulst, 'Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law', 2/2008 *Bucerius Law Journal*, p. 91.

¹⁵⁸ White Paper, s. 2.2.

¹⁵⁹ *Ibid.*, s. 2.2.

¹⁶⁰ Editorial Comment 'A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules', 45(3) *CMLRev.* (2008), p. 611.

However, not all commentators are satisfied with the way the Commission's proposal is drafted and ask for even stricter rules in order to avoid the dangers of abuse of the disclosure instrument and the necessity to protect confidential business information.¹⁶¹ Anything coming close to enabling private claimants to blackmail an undertaking into payments simply to avoid a lengthy disclosure procedure has to be avoided.¹⁶²

4.3.2 Shortcut through Transparency Regulation

The Commission's suggestion to allow limited *inter partes* disclosure in damages claims becomes understandable, when looking at the measures infringement victims have resorted to when looking for access to the public enforcer's file. Therefore, if defendants or third-parties had the obligation to disclose some documents, then the pressure would shift from the public enforcer to private parties instead.

Private claimants have been aware of the fact that in the public enforcer's file a lot of important information already exists, which would be helpful when bringing a follow-on claim to a civil court and therefore have sought access to these files through alternative means. In order to understand whether the access to evidence even needs to be regulated in a future directive, it is important to establish whether the access exists already and thereby additional regulating is made redundant.

The way to get access to the Commission files has been tried by resorting to the Regulation regarding public access to European Parliament, Council and Commission documents¹⁶³ (hereinafter 'Transparency Regulation'). Under this Regulation, any person has the right to access documents held by any of the institutions, subject to limited and restrictively construed exceptions. Also, when a person makes an application for access under this Regulation he does not need to provide a reason for their requests. This would not be a possibility under the solution, which was suggested by the Commission in the White Paper.

Recital 11 to the Transparency Regulation states that the principle mentioned in the previous paragraph, according to which all documents of the institutions should be accessible to the public. It continues by declaring that certain public and private interests should be protected by way of exceptions. Several of these exceptions are enumerated in Article 4 of the Transparency Regulation, including the protection of the purpose of

¹⁶¹ J. Drexl et al., 'European Commission – White Paper: Damages Actions for Breach of the EC Antitrust Rules', Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-07, p. 5.

¹⁶² *Ibid.*, p. 5.

¹⁶³ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145/43, 30.05.2001.

inspections, investigations, commercial interests of a natural or legal person, and the protection of internal documents where disclosure would undermine the institution's decision-making process. These exceptions can be overruled only where there exists an overriding public interest in disclosure. The mandatory injunction to refuse disclosure of these types of documents unless an overriding public interest prevails, presents a challenge because it does not give the Commission a wide discretion to disclose.¹⁶⁴

The General Court in *Technische Glaswerke Ilmenau* confirmed the fact that the Transparency Regulation is applicable in competition law proceedings.¹⁶⁵ Thus, as documents gathered in the course of investigations of violations of Articles 101 and 102 TFEU are not automatically exempt from the scope of the Transparency Regulation, plaintiffs in follow-on actions attempt to gain access to documents in the Commission files in the hope that those may aid them in carrying the burden of proof.¹⁶⁶

What can be said about the Transparency Regulation is that it is a rather accidental instance of regulation of the interface between public and private enforcement in the sense that its use (or attempted use) in private enforcement (especially in follow-on actions) could hardly be subsumed under the legislative intent behind it, which centres on the concept of governance openness.¹⁶⁷ Therefore, there is the risk that not all concerns, which derive from the need to protect leniency applicants, have been taken into consideration in this Regulation, thus making this not the optimal regulator in competition law cases.

4.3.3 Solution in *Pfleiderer* Case?

If in the previous chapter the access to Commission's file was sought, then in this chapter, it will be shown, how civil litigants have tried to get access to a NCA's file, which involved leniency applications. The recent *Pfleiderer*¹⁶⁸ case, in which the Court gave its judgment just last year, is a good example.

In *Pfleiderer*, the question was whether the parties, wanting to bring a civil-law claim, may be given access to information and documents voluntarily submitted in connection with leniency applications, which the national competition authority of a Member State had received.

¹⁶⁴ D. Wilsher, 'The Public Aspects of Private Enforcement in EC law: Some Constitutional and Administrative Challenges of a Damages Culture', 3(1) *CompLRev.* (2006), pp. 43-44.

¹⁶⁵ Case T-237/02 *Technische Glaswerke Ilmenau* [2006] ECR II-5131.

¹⁶⁶ J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) *European Competition Journal* (2009), p. 538.

¹⁶⁷ J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) *European Competition Journal* (2009), p. 538.

¹⁶⁸ Case C-360/09 *Pfleiderer* [2011] n.y.r.

In its ruling, the Court emphasised both the importance of damages actions for maintaining effective competition in the Union and the importance of effective leniency programmes, which would help to uncover and bring to an end infringements of competition rules.¹⁶⁹ At the end though, the Court decided to leave it up to the national courts to do the weighing exercise. Hence, it is up to the national courts on a case-by-case basis to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency.¹⁷⁰

This judgment received many comments, both positive and negative. It was even stated that this decision risks suffocating both future public and private enforcement. Since *Pfleiderer*, the question arises whether the leniency applicant may be ordered to disclose leniency documents, at least under the conditions set out in that judgement, whereas before, it could be argued that due to the duty of loyal cooperation, national courts were not entitled to order the leniency applicant to disclose leniency information.¹⁷¹ Komninos finds that the ruling has offered support to the Commission and the NCAs in their approach to resist or limit access to such evidence by civil claimants, when the effectiveness of their leniency programmes is at stake.¹⁷²

The Amtsgericht (District Court) Bonn, who had made the reference for a preliminary ruling to the Court, decided the case in the beginning of this year and rejected the application made by *Pfleiderer AG* to order the Bundeskartellamt (German Cartel Office) to disclose the documents submitted to it by leniency applicants.¹⁷³ Thus, it is clear how high the German antitrust system values its leniency programme and it could also be seen as an indicator of how other national courts will decide.

In the context of private actions for damages, this judgment means that the divergences in different Member States regarding access to documents might grow even further apart, as the decision can now be made on a case-by-case basis. In order to avoid increased pressure on public enforcers throughout the Union to allow access to their files, disclosure *inter partes* needs to be introduced.

¹⁶⁹ Ibid, paras. 25-29.

¹⁷⁰ Case C-360/09 *Pfleiderer* [2011] n.y.r., paras. 30-31.

¹⁷¹ C. Cauffman, 'The Interaction of Leniency Programmes and Actions for Damages', 7(2) *CompLRev.* (2011), p. 195.

¹⁷² A.P. Komninos, 'Relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari', 16th Annual EU Competition Law and Policy Workshop 'Integrating public and private enforcement of competition law: Implications for courts and agencies', Florence, 17-18 June 2011, p. 19. Available at <http://ssrn.com/abstract=1870723>

¹⁷³ Amtsgericht Bonn, Beschluss vom 18. Januar 2012 (51 Gs 53/09). Available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil_des_AG_Bonn_vom_18.01.2012_-_Az._51_GS_53-09.pdf

4.4 Fines and Damages

4.4.1 Fines

Pursuant to Article 23(2)(a) of Regulation 1/2003, the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 101 or 102 of the Treaty. In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion within the limits set by Regulation 1/2003, meaning that the Commission must have regard both to the gravity and to the duration of the infringement. In addition, the fine imposed may not exceed certain limits set out in the Regulation 1/2003.¹⁷⁴

The fines, which may be imposed by the Commission (or the national competition authorities) for infringements of the antitrust rules, are both a punishment and part of a general policy designed to control the conduct of undertakings. The intention is that the fine imposed should have a sufficiently deterrent or preventive effect.¹⁷⁵ Furthermore, the fines should not only deter the undertakings concerned from engaging in future infringements (special deterrence) but deter potential future offenders more generally (general deterrence).¹⁷⁶ The Court as well has stressed the importance of fines in the process of ensuring the effective enforcement of the competition law provisions.¹⁷⁷

It is important that the fine is set correctly, meaning that it outweighs the illegal profits gained from the cartel membership. Wils argues that the calculation of the optimal amount of the fine is always difficult in practice, but with public enforcement, it is possible to attempt to target the optimal amount.¹⁷⁸ In addition, the public enforcer's discretion is necessary in order to be able to set a sufficiently high level of fines. However, this discretion encompasses a great lack of transparency and certainty in the fining system of the public enforcer.¹⁷⁹ Furthermore, there is no guarantee that even with higher fines the effective level of deterrence can be reached,¹⁸⁰ which should after all be the most important aim of imposing fines.

¹⁷⁴ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 01.09.2006, paras. 1-2.

¹⁷⁵ Opinion of Advocate General Geelhoed on 26 January 2006 in Joined cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para. 64.

¹⁷⁶ See, Case T-13/03 *Nintendo* [2009] ECR II-975, para. 73.

¹⁷⁷ See, Case C-429/07 *X BV* [2009] ECR I-4833, paras. 36-37.

¹⁷⁸ W.P.J. Wils, 'Optimal Antitrust Fines: Theory and Practice', 29(2) *World Competition* (2006), pp. 206-208.

¹⁷⁹ P. Billiet, 'How lenient is the EC leniency policy? A matter of certainty and predictability', 30(1) *ECLR* (2009), p. 18.

¹⁸⁰ *Ibid*, p. 18.

4.4.2 Damages

The Court in *Manfredi*¹⁸¹ set out the rules for damages, according to which victims of an EU competition law infringement are entitled to full compensation of the harm caused, namely of ‘actual loss’ (*damnum emergens*) and of loss of profit (*lucrum cessans*), plus interest from the time the damage occurred until the capital sum awarded is actually paid.

For reasons of legal certainty and to raise awareness amongst potential infringers and victims, the Commission in the White Paper suggested codifying the current *acquis communautaire* on the scope of damages that victims of antitrust infringements can recover.¹⁸²

However, leaving aside the straightforward issue of the type of damages, the matter of calculation of damages in antitrust cases can be and usually also is a very complex matter. In practice, it is often impossible to quantify the damage suffered in an exact manner, as there are just too many unknown variables, beginning with the hypothetical market price if the violation had not taken place.¹⁸³ Therefore, it is generally accepted that courts may and must work with estimates, which is not an unusual practice in other cases either.¹⁸⁴

The Commission acknowledged the existence of the problems that national courts face when estimating the amount of damages in the Staff Working Paper.¹⁸⁵ As a result, the Commission has now issued a Draft Guidance Paper – *Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty*.¹⁸⁶ The aim of this Guidance Paper is to offer assistance to courts and parties involved in actions for damages by making more widely available information relevant for quantifying harm caused by infringements of the EU antitrust rules.¹⁸⁷ However, as this Guidance Paper is purely informative, it does not bind national courts and does not alter the legal rules applicable in the Member States to damages actions based on infringements of Article 101 or 102 TFEU.¹⁸⁸

¹⁸¹ Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para. 95.

¹⁸² White Paper, s. 2.5.

¹⁸³ F.W. Bulst, ‘Of Arms and Armour – The European Commission’s White Paper on Damages Actions for Breach of EC Antitrust Law’, 2/2008 *Bucerius Law Journal*, pp. 84-85.

¹⁸⁴ *Ibid.*, pp. 84-85.

¹⁸⁵ Staff Working Paper, para. 187.

¹⁸⁶ Available at

http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf

¹⁸⁷ Draft Guidance Paper – *Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty*, p. 2.

¹⁸⁸ *Ibid.*, p. 8.

4.4.3 Accumulation of Liability

As was concluded in the third chapter of this thesis, it is not possible to substitute public enforcement with private or vice versa. As a result, public law liability and civil law liability necessarily exist alongside each other.¹⁸⁹

AG Mazák is correct in his statement whereby so far neither legislation nor case law has established any *de jure* hierarchy or order of priority between public enforcement of EU competition law and private actions for damages.¹⁹⁰ Therefore, as there is no specific legislation on this matter, the accumulation of liability in public and private enforcement proceedings remains largely uncoordinated.¹⁹¹ Furthermore, the diverging national laws in this respect may promote instances of multiple liability.¹⁹² Various EU institutions, national courts and commentators have already expressed their concerns regarding this situation.

Now, a heated debate has arisen about whether the current approach of the Commission complies with the rule of law in Europe.¹⁹³ In particular, the *Intel* proceedings where the Commission imposed a record-high fine of over one billion Euros were a clear sign of the distinct tendency towards increasingly higher fines in this field. This has led some commentators questioning whether private enforcement could put undertakings under even more pressure.¹⁹⁴ Also, considering that administrative fines have a cap of 10% of the company's annual turnover, why is there no such restriction in the field of 'private fines'? All these concerns put even more pressure on the Commission to work out a 'harmonized system' relating to private damages claims and administrative fines. Otherwise, if no action is taken in this regard, the uncoordinated accumulation of liability in public and private enforcement proceedings could exceed the amount necessary to achieve enforceability and thereby lead to inefficient over-deterrence.¹⁹⁵

The principle of *ne bis in idem* could be of significance and help at this point. This principle means that a person cannot be 'sanctioned more than once for the same unlawful conduct to protect one and the same interest'. It

¹⁸⁹ M.J. Frese, 'Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability', 34(3) *World Competition* (2011), p. 406.

¹⁹⁰ Opinion of Advocate General Mazák on 16 December 2010 in Case C-360/09 *Pfleiderer* [2011] n.y.r., para. 40.

¹⁹¹ M.J. Frese, 'Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability', 34(3) *World Competition* (2011), p. 413.

¹⁹² F.W. Bulst, 'Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law', 2/2008 *Bucerius Law Journal*, p. 86.

¹⁹³ J.P. Terhechte, 'Enforcing European Competition Law – Harmonizing Private and Public Approaches in a More Differentiated Enforcement Model' in J. Basedow, J.P. Terhechte and L. Tichy (eds.), *Private Enforcement of Competition Law* (Nomos, 2011), p. 20.

¹⁹⁴ *Ibid.*, p. 20.

¹⁹⁵ M.J. Frese, 'Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability', 34(3) *World Competition* (2011), p. 419 and J. Kloub, 'White Paper on damage actions for breach of the EC Antitrust Rules: Plea for a More Holistic Approach to Antitrust Enforcement', 5(2) *European Competition Journal* (2009), p. 527.

is a general principle of EU law, which follows from the constitutional traditions of the Member States and has been codified in Article 50 of the Charter of Fundamental Rights of the European Union^{196 197}.

However, as already discussed earlier under ‘Leniency’, this principle does not protect a whistle-blower against other competition authorities or private damages claims after being granted immunity or being fined by the Commission.¹⁹⁸ In addition, an administrative fine imposed by the Commission or by a national competition authority on an undertaking has no significance in a civil trial centred on the same facts and undertakings. This means that the *ne bis in idem* principle does not apply as between administrative and private enforcement. At the same time, private damages awards that precede administrative (public) proceedings should in principle have no bearing on the possible fines.¹⁹⁹

From this it can be concluded that the *ne bis in idem* principle has not proven to be helpful for solving the problem of accumulation of liability, as it does not prevent simultaneous application of fines and damages in competition law infringements. This means that other solutions must be developed for this problem. Coordination on a general level is urgently needed, as otherwise, there will be an *ad hoc* approach taken in every case, which does not solve the problem at the core.

4.4.4 Multiple Damages – Yes or No?

Punitive or multiple damages are damages that are awarded to a claimant in a civil lawsuit on the basis of illegitimate conduct of the opposing party. Their goal is punitive and deterrent as opposed to compensatory, and their amount is therefore not dependent on the damages actually suffered, although in some legal systems, a ratio between compensation and punitive damages may exist.²⁰⁰

For the victims of anti-competitive conduct the instrument of multiple damages certainly provides a strong incentive to take legal action against the party causing the damage. The authors advocating the possibility of multiple damages find that under the aspect of deterrence it seems to be reasonable to balance a low probability of discovering anticompetitive conduct by the risk of higher damages.²⁰¹ However, if double damages are not necessary in all

¹⁹⁶ OJ C 83/02, 30.03.2010.

¹⁹⁷ M.J. Frese, ‘Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability’, 34(3) *World Competition* (2011), p. 424.

¹⁹⁸ P. Billiet, ‘How lenient is the EC leniency policy? A matter of certainty and predictability’, 30(1) *ECLR* (2009), p. 20.

¹⁹⁹ A.P. Komninos, ‘Public and Private Antitrust Enforcement in Europe: Complement? Overlap?’ 3(1) *ComplRev.* (2006), p. 23.

²⁰⁰ M. Hazelhorst, ‘Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far’, 19(4) *ERPL* (2010), p. 764.

²⁰¹ U. Böge and K. Ost, ‘Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives’, 27(4) *ECLR* (2006), p. 201.

competition law infringement cases, then in cases of hard-core cartels they are found to be a sensible solution, as it is important that cartel victims shall not be under-compensated and offenders not be under-deterred. Commentators find that in hard-core cartel cases, a double damages rule is more likely to award full compensation of the overall losses suffered than a simple damages rule.²⁰² Therefore, even if it occasionally leads to over-compensatory awards, then this is still easier to tolerate than the regular under-compensation, which results from the existent single damages rule.

However, the ones arguing against multiple damages definitely have more ‘heavyweight’ arguments on their side. First, the introduction of punitive damages would raise constitutional concerns in many Member States. For example, the German Federal Supreme Court has rejected a proposal to declare enforceable a US court decision, whereby punitive damages were awarded, which exceeded the damage suffered by the plaintiff. According to the Federal Supreme Court, punitive damages were incompatible with the state’s monopoly on punishment and the corresponding procedural safeguards, and with the ban on enrichment under the law of damages.²⁰³ This kind of punitive damages thus violated the substantive *ordre public* in Germany.

Secondly, multiple damages would also be in contradiction with the understanding of the law of damages according to which this law has a compensatory function.²⁰⁴ From an antitrust enforcement viewpoint, the potential for overcompensation acts as an incentive for claimants and provides an additional deterrent against potential infringers of antitrust laws, which is welcomed by enforcement agencies like the Commission. However, in most European jurisdictions, the notion of offering overcompensation is regarded as contrary to principle.²⁰⁵ Therefore, in most of the Member States according to the existent rules, the applicant is only entitled to receive compensation in the amount of damage actually suffered. As an exception to the rule in the EU, only the United Kingdom, Ireland and Cyprus allow for the award of punitive damages.²⁰⁶

However, not even in the United Kingdom the issue of punitive damages in competition law cases is very clear. Therefore, as a third matter, the *ne bis in idem* principle comes into play. The possibility of awarding multiple

²⁰² Editorial Comment ‘A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules’, 45(3) CMLRev. (2008), p. 613.

²⁰³ Bundesgerichtshof, Urteil vom 4. Juni 1992, BGHZ 118, 312. Available at <http://www.servat.unibe.ch/dfr/bz118312.html>

²⁰⁴ U. Böge and K. Ost, ‘Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives’, 27(4) ECLR (2006), pp. 201-202.

²⁰⁵ J.S. Kortmann and Ch.R.A. Swaak, ‘The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic’, 30(7) ECLR (2009), p. 347.

²⁰⁶ D.Waelbroeck and D. Slater, ‘The Commission’s Green Paper on Private Enforcement: ‘Americanization’ of EC Competition Law Enforcement?’ in C.-D. Ehlermann and I. Atanasiu (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart, 2007), p. 425.

damages gives rise to serious questions concerning this principle.²⁰⁷ The judgment of the High Court in *Devenish etc. v. Vitamin cartelists*²⁰⁸ deserves attention in this regard. There the English High Court held that the principle of *ne bis in idem* precludes the award of exemplary or punitive damages in an action for damages following a fining decision by the European Commission, even if the fine has been commuted to zero as a result of the application of the European Commission's Leniency Notice.²⁰⁹ This judgment is another example showing how reluctant national courts are of rewarding multiple damages to victims of a competition law infringement, at least in follow-on actions.²¹⁰ Therefore, it is still open whether the English courts would find differently in a stand-alone case, as there would be no prior punishment. However, in those cases the issue of *ne bis in idem* would be present if the public enforcer then afterwards decides to fine the infringer. Then the latter would have been punished twice for the same infringement, which would go against that principle.

As a result of the potential overcompensation, a fourth issue arises in the context of multiple damages claims, namely the risk of unjust enrichment of the applicant. The Court in its case law has emphasised that Union law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Union law does not entail the unjust enrichment of those who enjoy them.²¹¹ This means that national courts do not have to award multiple damages to the applicant, but only damages in the amount, which the latter can prove. The reason behind this statement is that a contrary finding would provide a strong incentive for claimants to sue thereby increasing the litigation culture that is not common to the European culture and traditions.²¹² Martin illustrates this danger of the US culture invading the EU by asking 'whether the cowboy has already ridden into town or whether there exists a fence tall enough to keep him out'.²¹³ Meaning that introducing such as strong incentive for going to court would bring Europe closer to the United States system that is necessary or even wanted by probably the vast majority of the Member States.

²⁰⁷ E. Gippini-Fournier, 'The Modernisation of European Competition Law: First Experiences with Regulation 1/2003', Community Report to the FIDE Congress 2008, p. 135.

²⁰⁸ *Devenish Nutrition Ltd & Ors v. Sanofi-Aventis SA (France) & Ors* [2007] EWHC 2394 (Ch) (19 October 2007).

²⁰⁹ See also, Case T-59/02 *Archer Daniels Midland* [2006] ECR II-3627, paras. 349-352, where the General Court found that the fact that the company had already paid treble damages in the United States, did not amount to an attenuating circumstance, when the Commission was calculating the fine.

²¹⁰ Admittedly, in the above-mentioned case from German Federal Supreme Court, it was not about rewarding multiple damages, but declaring another court's decision awarding multiple damages.

²¹¹ See, for example, Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297, para. 30; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para. 99.

²¹² J.S. Kortmann and Ch.R.A. Swaak, 'The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic', 30(7) ECLR (2009), p. 342.

²¹³ J.S. Martin, 'Private Antitrust Litigation in Europe: What Fence is High Enough to Keep out the US Litigation Cowboy?' 28(1) ECLR (2007), p. 2.

Furthermore, if multiple damages awards were introduced in this context, the focus of damages claims would shift fundamentally from the protection of private interests for compensation to the pursuit of the public interest in enhanced deterrence.²¹⁴ Additionally, it would unnecessarily blur the functions of private and public enforcement. The Commission has emphasised the importance of damages claims in increased deterrence by raising the stakes of the game, however, if this were the ultimate aim, then it would be not make sense to express concerns about the risk of unjust enrichment.²¹⁵

Finally, the Commissioner for Competition Joaquín Almunia expressed the Commission's view by stating that:

‘... the initiative must ensure that victims obtain full compensation of the actual loss incurred. But not more than full compensation. This is not about punishment, it is about justice.’²¹⁶

Considering the contra-arguments presented above, the introduction of multiple damages for violations of national or European competition law does not appear to be desirable. Moreover, when comparing general tort law with antitrust law, the latter does not show any exceptional features, which would justify such a massive intervention into the existing structures.²¹⁷ Information asymmetries or difficulties in presenting evidence also exist in other sectors such as the law on medical malpractice or product liability where a system of multiple damages has not been introduced either.²¹⁸

Therefore, it only makes sense that the Commission in the White Paper no longer mentioned double damages, presumably after the proposal in the Green Paper was severely criticized by the Member States.²¹⁹ However, the Commission in the Staff Working Paper explicitly leaves room for adaptation of the European definition of damages in the future.²²⁰ This means that the Commission has not totally given up on the idea of someday introducing multiple damages in the context of antitrust infringement proceedings, if it considers it necessary.

²¹⁴ E. Gippini-Fournier, ‘The Modernisation of European Competition Law: First Experiences with Regulation 1/2003’, Community Report to the FIDE Congress 2008, p. 132.

²¹⁵ Ibid, p. 132.

²¹⁶ J. Almunia, ‘Common standards for group claims across the EU’, 15 October 2010, SPEECH/10/554. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554>

²¹⁷ U. Böge and K. Ost, ‘Up and running, or is it? Private enforcement – the situation in Germany and policy perspectives’, 27(4) ECLR (2006), p. 202.

²¹⁸ Ibid, p. 202.

²¹⁹ M. Hazelhorst, ‘Private Enforcement of EU Competition Law: Why Punitive Damages Are a Step Too Far’, 19(4) ERPL (2010), pp. 765-766.

²²⁰ Staff Working Paper, para. 195.

4.5 No Need for Harmonisation?

Having regard to the difficulties arising in the relationship between public and private enforcement after the planned harmonisation, the question inevitably raises whether the harmonisation is necessary in the first place. Even if one would admit that private enforcement does have an important complementary role in the antitrust enforcement system, it does not necessarily mean that the measures for strengthening it should come from the Union legislator.

Therefore, it is understandable that the voices opposing a revolutionary development that the Commission is striving for with a directive grow stronger. It could also be said that instead of ground breaking actions taken by the Commission, the development of private damages actions should be evolutionary instead. Therefore, the Commission's task in this should be to give guidelines and wait for a natural course of events. This is especially true in the 'new' Member States where private enforcement actions are almost non-existent and where this is due to the underdevelopment of public enforcement, as follow-on claims are the ones that make up the majority of damages claims actions. Thus, instead of pushing forward the directive, the Commission should help on those Member States which clearly suffer from a suboptimal level of enforcement of competition law in general, not just on the private side.

One could therefore say that the Commission should not be pushing for the one-off solution that would facilitate private enforcement claims in all Member States. As there are 27 different national systems, they will be differently influenced by the harmonisation and the change cannot be presumed to always be positive or even necessary. It can already be seen that those Member States, which have a long and established history of public enforcement (e.g. the UK, Germany...), have understood the need for public enforcement actions and have taken the necessary steps to facilitate them in a manner which suits their own national system best.

Also, considering that a joint effort by the Commission and the Member States to increase awareness of the possibilities of bringing antitrust damages suits may be enough for the victims of anticompetitive conduct to find the ways of obtaining full compensation.²²¹ Hence, raising awareness of victims through discussions on this topic should already increase the number of claims brought and thereby also the number of victims obtaining compensation. If the latter is the real aim and the problem that the Commission wants to tackle with its potential future directive on the damages, then there is no actual need to start demolishing carefully balanced national tort law systems that do not enjoy the support of the Member States themselves. Even more so, as there are strong grounds to suspect that adverse consequences may well follow, and that reforms may unbalance

²²¹ J.S. Kortmann and Ch.R.A. Swaak, 'The EC White Paper on antitrust damage actions: why the Member States are (right to be) less than enthusiastic', 30(7) ECLR (2009), p. 350.

legal and societal values and the economy, rather than improve them.²²² Furthermore, amendments in relation to competition law would inevitably have consequences in all other sectors: competition law cannot be approached within civil justice systems in a vacuum.²²³ Interfering with the balancing factors runs the risk of destabilizing not only the system of justice, but also of society, and of introducing a litigation culture.²²⁴ The severity of the consequences, which may follow therefore need to be taken into consideration before issuing any legislation on this matter.

Moreover, considering that the continuously growing amount of fines indicate that public sanctions are reaching a high level of deterrence, one may wonder whether this is the right time for an initiative to top up the bill presented to competition law offenders with additional private sanctions.²²⁵ However: first, there is reason to believe that despite the Commission's recent successes in detecting violations of competition law, still only the tip of the iceberg is visible; second, there is hope that if provided with sufficient incentives, private parties will help to uncover (and as a consequence, deter) more anti-competitive practices than the Commission and its national counterparts would ever be able to find and deal with on their own.²²⁶ It can be concluded that these concerns and suggestions expressed earlier have been and will be ignored by the Commission who sees an enhanced antitrust enforcement as the greater good.

Furthermore, Eilmansberger claims that the objective of removing civil law obstacles to damages claims cannot be attained by soft law.²²⁷ He finds that it would be naive to expect national legislators or judges to make significant changes to the relevant civil law provisions with a view to facilitating cartel damages actions in reaction to mere guidelines or recommendations issued by the Commission.²²⁸ Soft law measures would not require the Member States to take action,²²⁹ which means that the situation where different procedures and remedies are available, would continue to exist. This on its turn would constitute an unjustified disadvantage for some individuals and companies. In addition, in certain cases it would encourage forum shopping in order to find the most favourable regulation. Nevertheless, it is still not clear what form this legislation will take, although Komninos proposes that a Community 'hard law' instrument, such as a directive, is most likely.²³⁰

²²² C. Hodges, 'Competition Enforcement, Regulation and Civil Justice: What is the Case?' 43(5) CMLRev. (2006), p. 1406.

²²³ Ibid, p. 1401.

²²⁴ Ibid, p. 1401.

²²⁵ Editorial Comment 'A little more action please! – The White Paper on damages actions for breach of the EC antitrust rules', 45(3) CMLRev. (2008), p. 609.

²²⁶ Ibid, p. 609.

²²⁷ T. Eilmansberger, 'The Green paper on damages actions for breach of the EC antitrust rules: reflections on the utility and feasibility of stimulating private enforcement through legislative action', 44(2) CMLRev. (2007), p. 438.

²²⁸ Ibid, p. 438.

²²⁹ Ibid, p. 438.

²³⁰ A.P. Komninos, *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* (Hart, 2008), p. 180.

Finally, the argument that the ‘new’ Member States are in need of a more effective public enforcement than introducing new action for damages rules, does not hold up either. Even if that is the situation and public enforcement lags behind, it does not mean that measures making private enforcement more operable cannot be taken in the meanwhile.

5 Concluding Remarks

5.1 Where Does Private Antitrust Enforcement Stand Now?

The reason why the position and functions of private enforcement needed to be analysed in the third chapter was that without the answers to those questions, it would not be possible to find the areas in which the harmonisation of private damages actions has the most influence on the existing enforcement system, where the public enforcement enjoys a monopoly. From the discussions and arguments in that chapter, the conclusion regarding the compensatory and complementary nature of private actions for damages was the most important. This means that damages actions and public enforcement should be perceived as smoothening out each other's shortcomings in many aspects. After finding that private enforcement is indeed vital for achieving an optimal enforcement system, the next step was to see, how far in the proposals made by the Commission in the White Paper the functions of private enforcement have been taken into account. Four key areas were analysed for this.

First, the idea of binding effect of NCA decisions is very welcomed in many aspects. For the applicants, this new setup would mean that they do not have to prove the infringement of competition law again. Gathering evidence regarding the breach would be burdensome for the applicants, as they have very limited investigatory means available to them, considering that generally there is no right to access the competition authority's file. From the perspective of the national court, the binding effect would ease their burden in actions for damages as well, because the civil court does not have to evaluate sometimes extremely complicated competition law infringements. Being 'mere assessors of damages'²³¹ would probably be welcomed by most non-specialised civil court judges.

This binding effect would also contribute a great deal towards legal certainty in this area, as this makes impossible a scenario in which an administrative court or an NCA has found there to be an infringement of competition law and at the same instance a civil court has not. For the infringer and defendant in the civil case, this would mean that it is not possible to rebut the existence of the infringement once the decision of the competition authority has become final. However, there is no reason why the infringer should get a second chance for proving his innocence. Therefore, the binding effect of NCA decisions should definitely be included in a directive regarding damages actions, as it shows that the Commission is committed to facilitating private damages actions and removing some of the obstacles. Thus, easing the burden of proof for

²³¹ A.P. Komninos, 'Effect of Commission Decisions on Private Antitrust Litigation: Setting the Story Straight', 44(5) CMLRev. (2007), p. 1428.

victims enhances the attractiveness of private damages actions, which provides an increased ability for these claims to fulfil their compensatory function.

As stated already earlier, leniency programmes will be the ones suffering most due to the reforms in private damages actions. The greater possibility of bringing follow-on actions for damages acts as a disincentive for potential leniency applicants, which would have serious consequences for the Commission and the NCA, who are increasingly relying on leniency. Therefore, it is understandable that the Commission is willing to interfere with the full compensation principle set out as the aim of the White Paper, in order to spare the attractiveness of leniency programmes. While trying to do this, the Commission has, however, forgot to take into account the Court's case law on damages actions. Namely, that the Court has worded a principle whereby 'any individual' has the right to claim damages. This principle is in stark contrast with the Commission's proposal to limit the civil liability of successful leniency applicants, by only allowing the latter's direct and indirect contractual partners to claim damages. This is a good example of how the Commission is willing to sacrifice the full compensation principle and thereby endanger the private enforcement as a whole, to what it defines as the public interest in greater antitrust enforcement.

The third matter assessed was the right to access evidence. The White Paper proposal includes disclosure *inter partes*, which will be subject to strict judicial control. This has the aim of facilitating damages claims by adding a possibility for the applicant to gather evidence for proving the amount of damages and the causal link between the breach and the harm inflicted.²³² The approach of the Commission may be welcomed for that it tries to set up a mechanism in order to avoid abusive litigation, which would only be brought to get access to a competitor's business secrets.

However, another motive of the Commission could be seen behind this new procedural rule. Namely, that the Commission is eager to diminish the interest of private parties to request access to the public enforcers' files in order to get evidence for a potential civil action. Private parties have tried to get access to the Commission's own files through the Transparency Regulation and in the Member States using national rules, which has not received overly positive reactions from the public enforcers. In their eyes cases involving leniency applications are the ones needing most protection. However, as the public enforcement is increasingly relying on its leniency programme to find infringers, there is a high likelihood that the files wanting to be accessed by victims involve leniency applicants. Hence, it would be detrimental for these programmes, if the right to access would be granted by a national court. This is possible scenario, as there is no regulation and no legal certainty at the moment, because cases are decided on a case-by-case basis. Therefore, creating the possibility of disclosure

²³² Due to the binding effect of Commission and NCA decisions, the infringement itself does not need to be proven again.

inter partes would be helpful for redirecting the attention from the public enforcement files.

The fourth issue covered was the relationship between fines and damages. The White Paper only provides for the codification of the *acquis communautaire*, thus it does not really change anything for the private claimants. The White Paper does not regulate the consequences of accumulation of liability, which is the consequence of simultaneous application of fines by the public enforcer and damages rewarded to private parties for the same infringement. By facilitating private damages actions, the likelihood of damages actually being awarded grows significantly. As concluded from the analysis above, the principle of *ne bis in idem* does not apply between administrative proceedings and private enforcement. Therefore, there is no coordination between the consequences of the two 'limbs' of enforcement, which may seriously affect the infringers' economic situation and in the worst case scenario lead them to bankruptcy. The fact that the Commission has not considered these potentially very serious consequences for the infringers shows that it has strong belief in the deterrent effect of penalties plus damages.

The White Paper does not include the Commission's initial idea of introducing double damages. Not pursuing this idea demonstrates just how determined the Commission is to getting the approval of the Member States in order then to be able to issue the directive. Even though double damages would work as an incentive for potential claimants to bring an action and as a strong deterrent for infringers, the Commission sacrificed this idea. It should be clear, that the exclusion of certain controversial instruments from the White Paper may increase the chances of reaching political agreement on other measures the Commission recommends.²³³

All in all, the impression one gets from the proposals made in the White Paper, is that the Commission does try to take measures to facilitate private damages actions, but at the same time making sure that nothing threatens its Leniency Programmes. Therefore, as to the relationship between public and private enforcement after the harmonisation, the commentators hoping for a delicately balanced system,²³⁴ should be disappointed. At least at the moment it seems that the Commission does not depart from the idea of superiority of public enforcement in the European Union competition law enforcement. In addition, the Commission still looks at private damages actions mostly as adding to the deterrent effect, thus not prioritising their compensatory nature. Once this is understood, it is possible to comprehend the choices the Commission has made in scenarios where private and public

²³³ See, F.W. Bulst, 'Of Arms and Armour – The European Commission's White Paper on Damages Actions for Breach of EC Antitrust Law', 2/2008 Bucerius Law Journal, p. 84.

²³⁴ J.P. Terhechte, 'Enforcing European Competition Law – Harmonizing Private and Public Approaches in a More Differentiated Enforcement Model' in J. Basedow, J.P. Terhechte and L. Tichy (eds.), *Private Enforcement of Competition Law* (Nomos, 2011), p. 20 and J. Drexel et al., 'European Commission – White Paper: Damages Actions for Breach of the EC Antitrust Rules', Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 09-07, p. 3.

enforcement overlap. Nevertheless, even if the Commission's choices are comprehensible (in order to secure its position and the dominance of public enforcement), it does not mean that they are right. There is no plausible reason (besides the historic tradition) why public enforcement needs to be prioritised in every situation. The legislative action taken now presents a good opportunity to break this pattern. Otherwise, it will always be the private enforcement, which has to give way to the needs of public enforcement. This means that even after the harmonisation has been concluded, private enforcement still has to settle with the role of a 'side-kick' of public enforcement in the overall enforcement system.

However, from the perspective of potential private claimants, any measure taken for eliminating obstacles is welcomed, regardless of the potential ulterior motives of the legislator. After all, for the victims of competition law infringements all that matters is the possibility of recovering the harm suffered from the infringers. The rest is just a matter of policy.

5.2 How to Go Forward?

However, the Commission will find some of the battles in the quest for a harmonised system of private damages actions very difficult. It will not just be the question of why special procedural rules for competition law are needed, but the broader sovereignty question for the Member States who see national procedural law substantially off limits to Union law activity save where there is a compelling cross-border argument.²³⁵ In addition, not all the proposals in the White Paper taken separately received positive feedback from the commentators, especially those where the needs of public and private enforcement had to be weighed against each other. Hence, it will be interesting to see whether the draft Directive can be adopted in its current form and despite the resistance of some Member States and the European Parliament.²³⁶

Regardless of these concerns raised, the Commission has scheduled this legislative initiative into its Work Programme for 2012. There the objective is defined as ensuring effective damages actions before national courts for breaches of EU antitrust rules and clarifying the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, in order to preserve the central role of public enforcement in the EU.²³⁷ It is indeed intriguing to see just how successful

²³⁵ A. Riley and J. Peysner, 'Damages in EC antitrust actions: who pays the piper?' 31(5) *ELRev.* (2006), p. 756.

²³⁶ S. Peyer, 'Myths and Untold Stories – Private Antitrust Enforcement in Germany', CCP Working Paper 10-12 (2010), p. 6. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695

²³⁷ Commission Work Programme 2012, Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 777 final VOL. 2/2, 15.11.2011.

this attempt will be and if the Commission does manage to get all the Member States aboard this initiative.

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